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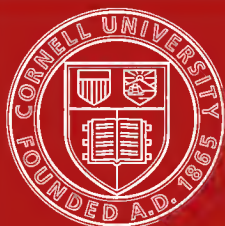
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AN
ELEMENTARY TREATISE
on the
Jurisdiction and Procedure
of the
FEDERAL COURTS

By

JOHN C. ROSE

UNITED STATES DISTRICT JUDGE FOR
THE DISTRICT OF MARYLAND

BALTIMORE
KING BROTHERS
1915

135497

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By

JOHN C. ROSE

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PREFACE.

This book is intended for the use of those who know little or nothing as to the jurisdiction and proceedings of the Federal courts, and who would like to learn the fundamental rules concerning them. It had its origin in a course of lectures which for a number of years past have been given to the senior class in the Department of Law, University of Maryland.

I am indebted to Samuel Want, Esq., of the Baltimore Bar, for the index hereto.

BALTIMORE, MD.,

DECEMBER, 1914.

I am under great obligations to C. John Beenwkes, Esq., of the Baltimore Bar, for his kindness in revising the proofs and for many valuable suggestions, especially as to the order of arrangement of the various sections.

ADDITIONS AND CORRECTIONS.

Page 178, Sec. 260.—United States v. New York Steam Fitting Co.,
235 U. S., , approves Vermont Marble Co. v.
National Surety Co., 213 Fed., 429.

Page 213, Sec. 316.—The reference should be to Sec. 31 of the Judi-
cial Code; not to Sec. 21.

Page 336, Sec. 514.—By an act passed in December, 1914, the Su-
preme Court is authorized to grant certiorari
when decision is in favor of the Federal right
claimed.

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JURISDICTION AND PROCEDURE

OF THE

COURTS OF THE UNITED STATES.

CHAPTER I.

THE ORIGIN AND THE LIMITS OF THE JURISDICTION OF THE FEDERAL COURTS.

1. **Introduction.**—In an ideal State there would be only one set of courts. If a controversy is one with which the law can deal at all, there should be no room for difference of opinion as to what tribunal may pass upon it. If there are different kinds of Courts, the limits of their jurisdiction with respect to each other must be defined. The affairs of men are of infinite variety. No one can foresee all their possible complexities and combinations. No statute can draw the line which separates the cases of which one Court may take cognizance from those which may be passed upon only by another, so accurately and so minutely as to foreclose the possibility of dispute as to whether a particular controversy lies upon one side or the other of it. Time, money, learning and professional experience and skill will be spent in finding out, not what the substantial rights of the parties are, but merely what Court may pass upon them. When there are two or more systems of Courts, it is almost inevitable that their procedure will differ in some respects. Their pleading and practice will not be quite the same. Moreover, mutually independent tribunals will, probably sometimes come to different conclusions as to what is the substantive law. Each will be prone to hold to its own view. It may follow that the result of a particular suit will turn altogether upon whether it is tried in one Court or in another. It is possible

to conceive of a case which the plaintiff will be bound to win in a State Court sitting perhaps on one side of a street and which he will as certainly lose if it be determined by the United States Court which may hold its sessions on the other side of the same thoroughfare. Such a state of things does not increase popular respect for either the law or the persons or tribunals administering it.

This little book seeks to state and briefly to explain the general rules which determine the jurisdiction of the Federal Courts; to give some account of the organization of the Federal judicial system; to point out the more important respects in which the procedure of these tribunals differs from those of the States; and to say a little about those subjects of general law upon which they do not feel themselves bound to follow the decisions of the State Courts, and in which in consequence they may upon the same state of facts reach an opposite conclusion.

A number of volumes, everyone larger than this, have been written on these subjects. Many others will be. Thousands of decisions relate to them. Most industrial processes are, in a scientific sense, wasteful. They fail to turn to the best theoretical advantage much of the material consumed and much of the energy exerted. No furnace as yet constructed is able to make profitable use of all the power latent in the fuel burned. The money, the time, the learning, the ability and the nervous force which have been laid out in answering such questions as those with which this treatise deals represent in a way, the same sort of economic loss as that which is incurred when all the power, which for countless centuries has been stored up in a ton of coal, is expended in order that a small percentage of it may be put to the use of man. Within the present limits of our knowledge we can do no better. Waste is part of the cost of use. So the necessity of dealing with the problems herein discussed is a portion of the price we pay for our dual system of government. That system has been worth all that in this and other ways it has cost us. Without a system of Federal Courts independent of those of the States, and, in the case of the Supreme Court

when dealing with a certain class of questions paramount to them, our Federal Government would not be what it today is. Very probably it would ere this have been dissolved.

Nevertheless, no good purpose can be served by shutting our eyes to the fact that in some respects that system is costly; this must be generally recognized before much can be done to reduce such expenditure to its theoretical minimum. The activities of the Federal Government are now far greater than they were in earlier years. It is not unlikely that for sometime to come they will still further increase. It does not necessarily follow that there must be a proportionate expansion of the volume of litigation in the Federal Courts. The duty of enforcing Federal Rights may by Congress be imposed upon the State Courts.¹ Local and sectional prejudice is much less general and intense than it once was. Doubtless it will still further abate. There will be correspondingly less occasion to seek in the Federal Courts protection from it.

We have become in fact one people. We none the less still clearly recognize the paramount importance of maintaining and, if possible, of developing every existing instrument of local self government even though it be at the cost of some temporary sacrifice of efficiency in administration. No considerable body of opinion in this country has ever sought centralization for its own sake. There are no longer any large number of persons who cherish any intense jealousy of the Federal Government. It should be easier than it has been to agree upon what should be the limits of the respective jurisdictions of the State and of the Federal Courts.

The pages which follow deal with the Courts of the United States as they now exist. Such reference is made to past conditions as may help to a more accurate understanding of the present.

2. Nature of the Questions Discussed.—Questions of jurisdiction, of pleading and of practice are not usually interesting. They deal with none of those touches of nature, whether great or trivial, which make all the world akin. Nor

¹ Second Employers' Liability Cases, 223 U. S. 1.

have they interest of another kind. Practical considerations usually determine the limits of the jurisdiction of a particular Court and the ways in which cases are brought into it and tried before it. The rules which govern in such matters are arbitrary rather than logical. The topics here discussed cannot therefore have that fascination which the ordered and reasoned unfolding of an abstract idea exerts upon well-trained minds. It is none the less necessary that those who are to practice law in these United States shall know something about the national Courts as distinguished from those of the States. A member of the Bar should know when he may and when he may not assert or defend the rights of his clients in the Federal tribunals.

3. Principles More Important Than Details.—The subject is arbitrary. In some respects it is highly technical. It abounds in nice distinctions. The law student cannot hope to get all of them into his head. It is just as well that he should not try. There are a number of general principles. These he should master. He should do more than remember them. He should understand them. To help him to do so is the purpose of this book. Details cannot be altogether avoided. Without some reference to them it would not be easy to see how in practice the principles work. The exceptions and qualifications which the statutes and the decisions have grafted upon the general rules must be stated. They are the rocks and the shoals which make legal navigation dangerous. Every chart, however simple and in mere outline it may be, must show them, if it would not lead those who use it into peril.

4. All Federal Courts Creatures of Written Law.—The great principle which lies at the bottom of all the law as to the jurisdiction of the Federal courts is that they owe their existence and their jurisdiction to certain written enactments. These may be constitutional or legislative. Whether they are one or the other, they are alike written. They are the original authorities. Behind them you need not look.

Indeed, you may not for any purpose other than that of finding out what they mean.

5. All Federal Courts of Limited Jurisdiction.—No Federal Court may deal with any controversy, over which it has not been given authority by some constitutional or statutory grant.

It follows that the Federal Courts, from the Supreme Court to the Courts of the Referees in Bankruptcy, and the Courts, if they may be so called, of the United States Commissioners, are one and all Courts of limited jurisdiction. In this they differ radically from the superior Courts of the States. The latter are, for the most part at least, Courts of general jurisdiction. It is true that all our States have written Constitutions. In most of them the judicial tribunals as they now exist are the creatures of those Constitutions or of statutes. Even the English Courts of today are the offspring of Victorian legislation. Nevertheless, the State Courts and the English Courts, no matter how recently created, are in some way given powers which make them Courts of general jurisdiction in a sense in which no Federal Court is.

6. Superior Maryland Courts Are of General Jurisdiction.—An illustration of what is meant may be found in Maryland. The Circuit Courts in the several counties date from the Constitution of 1851. In the form in which they actually exist today they were created by the Constitution of 1867. The powers they now have are those given them by it. It says they shall have "all the power, authority and jurisdiction * * * which the present Circuit Courts now have and exercise, or which may hereafter be prescribed by law."¹ The Constitution of 1864 used like language.²

The Constitution of 1851, which for the first time created Circuit Courts, gave them all the power, authority and juris-

¹ Constitution of Maryland, 1867, Art. IV, Sec. 20.

² Constitution of Maryland, 1864, Art. IV, Sec. 25.

diction of the former County Courts, and their judges, within their respective circuits all the jurisdiction of the old Court of Chancery.³

When by constitutional amendment adopted in 1805, the judicial system of the State was reorganized, similar language was used to show that the new County Courts were the successors of the old.⁴

These County Courts were far older than the Revolution. The first State Constitution, that of 1776, recognized their existence.⁵ It did not define their jurisdiction. It has long been the settled law of Maryland that those Courts acquired before the Declaration of Independence all the jurisdiction and powers of the Superior Courts of Westminster, except in so far as such powers and jurisdiction were obviously out of place under the political system or organization of the Province. Such powers and jurisdiction the Maryland Courts still have unless

(a) they have been taken away by some constitutional or legislative enactment; or

(b) are incompatible with the form of government set up by the constitution formed by the people of Maryland for themselves.

An important consequence follows. If you wish to dispute the jurisdiction of a Circuit Court of a Maryland county or of the Superior Court of Baltimore City, over any suit which could have been brought in any one of the three great Courts in Westminster Hall, you must affirmatively show how and why it is that the Maryland tribunal has not the right to entertain that suit. If you cannot point out some valid enactment, legislative or constitutional, which has taken away jurisdiction over that class of controversies, you must try the case in the Court in which it has been brought, unless you can demonstrate that judicial settlement of such issues as are raised by it is not consistent with the political system

³ Constitution of Maryland, 1851, Art. IV, Sec. 8.

⁴ Amendment to Constitution of 1776, 1 Poore's Constitution and Charters, §30.

⁵ Constitution of 1776, Art. XL, XLVII.

under which we live or the organization of our form of government.⁶

As Courts of general jurisdiction, the presumption is that whatever they have done they have rightfully and legally done.

The origin and the limits of the jurisdiction of the Maryland Courts have been compared with those of the Federal tribunals because a concrete illustration may make clearer the abstract rule. The doctrine is one of general application and could be illustrated as well from the constitutions and statutes of any other State.

It was clearly stated by CHIEF JUSTICE TANEY in his opinion in an historic case. Speaking of the higher Courts of the several States, he said:—

“Where they are what the law terms Courts of general jurisdiction, they are presumed to have jurisdiction unless the contrary appears. No averment in the pleadings of the plaintiff is necessary in order to give jurisdiction. If the defendant objects to it he must plead it specially, and unless the fact on which he relies is found to be true by a jury or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an Appellate Court.”⁷

It follows that even on a direct appeal from one of the Superior Courts of a State, or upon a review of its proceedings upon writ of error, the appellant or plaintiff in error must affirmatively show upon the face of the record or by his bill of exceptions that error has been committed.

The presumption is that whatever jurisdiction was taken and whatever was done was properly taken and done, unless the contrary appears.⁸

7. Federal Courts of Limited Jurisdiction.—On the other hand, the Courts of the United States are Courts of *limited jurisdiction*. If a case comes up from one of the State Courts of general jurisdiction to a higher Court of

⁶ Tomlinson's Lessee vs. DeVore, 1 Gill, 345.

⁷ Dred Scott vs. Sanford, 19 How. 401.

⁸ Schulze vs. State, 43 Md. 295.

the State, the latter does not search the record for allegations sufficient to show the jurisdiction of the former. It assumes that there was jurisdiction unless one of the parties says that there was not, and shows from the record not that jurisdiction might not have existed, but that it did not. On the other hand, if a record comes up from a District Court of the United States to a United States Circuit Court of Appeals or to the Supreme Court, the appellate tribunal will of its own motion look through the record to find out whether from all facts therein set forth it clearly appears that the District Court had jurisdiction. If for anything shown by the record the Court below may or may not have had jurisdiction, the Appellate Court will proceed no further with the case.

8. Record in Federal Courts Must Affirmatively Show Jurisdiction.—At a very early date in the history of the Government under the Constitution, the Bank of North America brought suit in a Circuit Court of the United States against one Turner as administrator of a certain Stanley upon a promissory note drawn by the deceased to the order of Biddle & Co., and by that firm endorsed over to the plaintiff. The declaration alleged that the plaintiff was a citizen of Pennsylvania; that Stanley and Turner were citizens of North Carolina. It said that Biddle & Co. used trade and merchandise in partnership together at Philadelphia or North Carolina. Under the statute the Circuit Court had no jurisdiction of a suit brought by an endorsee of a promissory note against the maker unless it would have had jurisdiction had the suit been brought by the original payee. In this case it will be noted that the citizenship of Biddle & Co., the original payees, was not alleged. The partners in that firm might, so far as anything appeared, have been citizens of any State or aliens. In the Court below there was a judgment for the plaintiff. In the Supreme Court this judgment was reversed. The Court, speaking through CHIEF JUSTICE ELLSWORTH, said:

“A Circuit Court * * * is of limited jurisdiction and has cognizance not of cases generally but only of a few specially circumstanced, amounting to a small proportion

of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction until the contrary appears. This renders it necessary, inasmuch as the proceedings of no Court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record of a Circuit Court the facts or circumstances which give jurisdiction either expressly or in such manner as to render them certain by legal intendment.”¹

It is not necessary that the absence of the proper jurisdictional averments shall be set up by one of the parties. The Appellate Court will of its own motion notice the omission.

A bill in equity was filed in a United States Circuit Court. The caption of the bill was

“THOMAS JACKSON, a Citizen of the State of Virginia; WILLIAM GOODWIN JACKSON and MARIE CONGREVE JACKSON, Citizens of Virginia, Infants, by Their Father and Next Friend, the said THOMAS JACKSON,

vs.

The REV. WILLIAM ASHTON, a Citizen of the State of Pennsylvania. In Equity.

In the body of the bill the Virginia citizenship of the plaintiffs was directly alleged. All that was said in that connection of the defendant was that he “was of the City of Philadelphia.” The Court below passed upon the merits of the case and entered a decree in favor of the defendant. There was an appeal to the Supreme Court. The case was there set down for argument. Counsel addressed the Court. The latter of its own motion called attention to the fact that the bill did not allege the citizenship of the defendant. The parties wished to have a decision of the Supreme Court upon

¹Turner vs. Bank of North America, 4 Dallas, 11.

the merits. They united in asking the Court to waive the point. CHIEF JUSTICE MARSHALL said:—

“The title or caption of the bill is no part of the bill and does not remove the objection to the defects in the pleadings. The bill and the proceedings should state the citizenship of the parties to give the Court jurisdiction of the case. The only difficulty which could arise to the dismissal of the bill presents itself upon the statement that the defendant is of Philadelphia. This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question the Court might decide otherwise, but the decision of the Court in cases which have heretofore been before it has been expressed upon the point.”²

The general principle was fully discussed in the famous case which bulked so large in the constitutional and political discussions of the years immediately preceding the Civil War.

Dred Scott, a negro, alleged that he was free. He said he was unlawfully held as a slave. He brought suit in a United States Circuit Court to recover his freedom. He asserted that he was a citizen of Missouri. By plea the defendant set up that the plaintiff was not a citizen and could not be, because he was of African and servile descent. The plaintiff demurred. The demurrer was sustained. The defendant pleaded over. In the Supreme Court the plaintiff claimed that the defense of no jurisdiction was no longer open to the defendant. By pleading over on the merits after his plea was held bad he had admitted jurisdiction. Under the then recognized rules such an admission once made could not be recalled. CHIEF JUSTICE TANEY said:—

“But in making this objection we think that the peculiar and limited jurisdiction of the Courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary in these Courts to adopt different rules and principles of pleading so far as jurisdiction is concerned from those which regulate Courts of common law in England and in the different States of the Union which have adopted the common law rules. * * * Under the Constitution and laws of the

² Jackson vs. Ashton, 8 Peters, 148.

United States the rules which govern the pleadings in its Courts in questions of jurisdiction stand on different principles and are regulated by different laws. This difference arises * * * from the peculiar character of the Government of the United States, for although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers enumerated in the Constitution have been conferred upon it; and neither the legislative, executive nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department the cases in which the Courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a Court of the United States it is necessary that he should show in his pleading that the suit he brings is within the jurisdiction of the Court and that he is entitled to sue there. And if he omits to do this and should by any oversight of the Circuit Court obtain a judgment in his favor, the judgment would be reversed in the Appellate Court for want of jurisdiction in the Court below. The jurisdiction would not be presumed, as in the case of a common law English or State Court unless the contrary appeared. But the record when it comes before the Appellate Court must show affirmatively that the inferior Court had authority under the Constitution to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States, and he cannot maintain his suit without showing this fact in his pleadings.”³

The Court held that the plaintiff in this great case had shown that he was not a citizen of Missouri. He was a negro and had been a slave. In the view of the majority of the Court those facts were inconsistent with citizenship.

³ *Dred Scott vs. Sanford*, 19 How. 401.

9. Duty of Every Federal Court to Make Sure it Has Jurisdiction.—It is the duty of every Court of the United States before which a case comes, whether originally or upon appeal or writ of error, to satisfy itself that upon the face of the record facts appear giving it jurisdiction. If they do not the case may not be further proceeded with. So soon as the absence of any of the necessary jurisdictional averments is noticed the case must be stopped, it matters not how far it has gone, provided final judgment or decree has not been entered up by the Court before which it is pending.

10. District Courts Not Inferior Courts in Common Law Sense.—The Constitution says that Congress may from time to time ordain and establish “inferior” Courts. It is under this grant of authority that all the Federal Courts, other than the Supreme Court, have been created.

The word “inferior” in connection with the word “Courts” has two meanings. At common law the word so used had a technical significance. An “inferior” Court was one whose judgments or decrees could not be set up even collaterally without showing affirmatively by the record the existence of all the circumstances necessary to give jurisdiction. -

A Maryland case will illustrate this rule. A defendant in ejectment claimed under title originating in a sale under an execution issued on a magistrate’s judgment. The law then required that such sales should be reported to the Superior Court and by it ratified. This was done. In the record of the magistrate, however, nothing appeared to show that the person against whom judgment had been given had ever been summoned. Even after final judgment no presumption could be made in support of the jurisdiction of such an inferior Court as that of a Justice of the Peace. The defendant in the ejectment case relied solely upon the execution sale. It was held that he had acquired no title thereby.¹

It would be easy to multiply authorities on this point.²

¹ Fahey vs. Mottu, 67 Md. 252.

² Cooley Constitutional Limitations, p. 585, Note 2; Argument of Stockton in Kempe vs. Kennedy, 5 Cranch, 179.

More than a century ago the Supreme Court, speaking through the mouth of CHIEF JUSTICE ELLSWORTH, declared that the Circuit and District Courts of the United States were not inferior Courts in the common law sense. The word inferior as used in the Constitution has another meaning. It serves merely to mark their relation to the Supreme Court. Their proceedings are "not subject to the scrutiny of those narrow rules which the caution or jealousy of the Courts at Westminster long applied to Courts of that denomination, but are entitled to as liberal intendments, or presumptions in favor of their regularity as those of any Supreme Court."³

The Chief Justice did not mean that the same presumptions would be raised in favor of the jurisdiction of a Federal Court as in support of that of a Superior Court of one of the States. Indeed the very case from which the quotation is made is an authority to the contrary. The judgment was reversed for failure of the record to disclose diversity of citizenship between the plaintiff and the defendant, a circumstance which would not have had to have been alleged had the proceeding been in a State tribunal.

11. Objection to the Absence of Jurisdictional Allegations Cannot be Made After the Judgment or Decree Itself Can No Longer Be Directly Attacked.—In the case last cited it was held that where on a direct appeal or writ of error the record does not affirmatively show that the Court of first instance had jurisdiction, the appellate tribunal will order the case dismissed. There, however, comes a time after which the binding force of the judgment or decree can no longer be assailed on the ground that the record does not affirmatively show jurisdiction.

If a suit proceeds to final judgment or decree, and the time in which an appeal can be taken or a writ of error sued out goes by without action, the judgment or decree is presumed to be valid and binding to the same extent as under like circumstances that of a State Court of analogous rank would be. If an appeal has been taken or a writ of

³ Turner vs. Bank of North America, 4 Dallas, 11.

error sued out, and the case has been heard and disposed of by the Appellate Court, and its mandate has been issued, it will thereafter be too late to raise an objection that the record does not affirmatively show the existence of jurisdiction.

A bill in equity had been filed in the United States Circuit Court for the District of Kentucky. The cause was prosecuted to final decree. An appeal was taken to the Supreme Court. The decree below was there reversed and the cause sent back with instructions to the Circuit Court to re-enter it in different terms. After the mandate had gone down the defeated party for the first time called attention to the fact that the record did not contain all the necessary jurisdictional averments. Their absence had not been noted theretofore. The Supreme Court held that it was then too late to make the point. Its mandate was final. The case could not be reopened.¹

12. Validity of Judgment Cannot be Collaterally Attacked Because of Absence of Jurisdictional Allegations.—From the principle stated in the last paragraph, it logically follows that the regularity and binding force of a judgment or decree of a United States District Court cannot be collaterally attacked because the record of the cause does not on its face show that the Court had jurisdiction. The fact that the District Court has taken jurisdiction raises under the conditions stated a presumption that it acted rightfully in so doing.

A bill in equity was filed praying discovery and a decree for the conveyance of certain lands. The answer alleged that a similar bill had been filed in the United States Court for the District of Ohio, that a decree had there been made in favor of the defendant and the bill dismissed. The complainant objected that the decree of the United States Court was not binding because the record of the proceedings in that

¹ *Skillern's Executors vs. May's Executors*, 6 Cranch, 266.

Court did not contain the necessary allegations of diverse citizenship. The Supreme Court, however, said:—

“The reason assigned by the replication why that decree cannot operate as a bar is that the proceedings in that suit do not show that the parties to it, plaintiffs and defendants, were citizens of different States and that consequently the suit was *coram non iudice* and the decree void. But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior Courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior Courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings their judgments and decrees are erroneous, and may upon writ of error or appeal be reversed for that cause. But they are not absolute nullities. * * * We are, therefore, of opinion that the decree of dismissal relied upon in this case, whilst it remains unreversed is a valid bar of the present suit as to the above defendants.”¹

Under the present bankrupt law a petition was filed against a corporation asking that it be adjudged an involuntary bankrupt. It came in and consented. Adjudication followed. None of its creditors objected. A holder of much of its stock was indebted to a third person, who thought that the adjudication of the corporation injured him by lessening the value of the stock belonging to his debtor. He came into the Court of Bankruptcy, asserting that the decree of adjudication was void and should be set aside. He pointed out that the creditors' petition by which the proceedings were begun did not contain the necessary jurisdictional averments. The Court answered that he was not a person interested within the meaning of the bankrupt law, and consequently could not be a party to the bankruptcy proceedings. None but a party could attack a decree, passed by a Court of limited but not of inferior jurisdiction.²

¹ McCormick vs. Sullivan, 10 Wheat, 199; See also Evers vs. Watson, 156 U. S. 533.

² *In re* Columbia Real Estate Co., 101 Fed. 970.

13. A Federal Court Can Entertain No Suit Except By Authority of an Express Written Enactment.—The fact that a presumption in favor of the regularity of the proceedings of a Federal Court may be sufficient to sustain its judgments or decrees against collateral attack, is in no sense a limitation upon or an exception to the general rule that no Court of the United States may exercise any jurisdiction not given to it by some statute. Every one who brings any suit in such a Court should first read the very written enactment which gives to it jurisdiction over that particular kind of controversy.

14. No Federal Court Can Exercise Any Jurisdiction Not Given to the United States By the Second Section of the Third Article of the Constitution.—The second great principle to which the students' attention should be directed is that no Federal Court has, or by possibility can have, any jurisdiction over any case unless it is one included within the grant of judicial power made by the second section of the Third Article of the Constitution of the United States. That section declares that

“Judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors and other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.”

In an early case coming up to the Supreme Court from a Circuit Court of the United States the defendants were described in the record as “late of the District of Maryland, merchants.” Nothing else was said as to their citizenship. The plaintiffs were alleged to be aliens and subjects of the

King of the United Kingdom of Great Britain and Ireland. Luther Martin, who appeared above for the defendants, contended that the Court below had no jurisdiction. It was nowhere alleged that the defendants were citizens of any State. Lee, who represented the plaintiffs, pointed out that the judiciary act expressly gave jurisdiction to the Circuit Court of all suits to which an alien was a party. CHIEF JUSTICE MARSHALL said: "Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution." The words of the Constitution where aliens are concerned give jurisdiction only when the suit is between them on the one hand and citizens of a State on the other. The omission from the record of the important allegation was a clerical oversight. It was by consent supplied by amendment.¹

15. Neither Congress Nor Consent of Parties Can Extend Jurisdiction of Federal Courts Beyond Constitutional Grant.—If Brown and Jones are citizens of the same State, they cannot have a controversy between them tried in the Federal Courts unless their dispute arises under the Constitution, the law or treaties of the United States, or is a matter of admiralty and maritime jurisdiction, or relates to the title of land which they each claim under grants from different States. They could not try their quarrel in those Courts even if an express statute of Congress said they might. The statute would itself be void as attempting to extend the jurisdiction of the Federal Courts beyond the limits of the judicial power given to the United States by the Constitution.

16. Federal Courts Careful to Exercise No Jurisdiction Not Clearly Theirs.—From the beginning the Federal Courts have been careful to confine their activities within the very letter of the constitutional grant. They have never attempted to extend their jurisdiction by indirection. They have, with one exception to be fully discussed in a later

¹ Hodgson vs. Bowerbank, 5 Cranch, 303.

chapter, never resorted to legal fictions to get over, under or around the barriers erected by the Constitution.

In many countries at some periods in the development of their legal procedure, every Court struggled to extend its own jurisdiction and to limit that of all competing tribunals. To accomplish those ends resort was had to the most barefaced fictions. The Court of Exchequer was a Court which had jurisdiction over matters affecting the royal revenues, and over them alone. It became a Court of concurrent jurisdiction with the Court of Common Pleas by the simple expedient of allowing the plaintiff to say that he was a debtor to the King. It followed that the King's revenue was concerned in his securing his rights against the defendant, for if the defendant was forced to pay the plaintiff, the plaintiff would be the better able to pay the King. The Court forbade the defendant to deny that the plaintiff in truth owed the King anything or ever intended to pay His Majesty a cent.

The Court of King's Bench in like manner permitted a plaintiff to allege that the defendant was in the custody of its marshal, and was therefore suable only before it. This statement was always untrue, but the Court would never let the defendant dispute it. The Federal Courts, on the other hand, from the beginning of the Government have been inclined to limit rather than to extend their jurisdiction.

17. Congress Always Anxious to Restrict Jurisdiction of Federal Courts.—Congress itself has been very unwilling to extend the jurisdiction of the United States Courts. The jurisdiction which they now exercise or have ever exercised is but a very small part of that which Congress might constitutionally confer upon them if it was so minded. It never has been. Quite naturally, therefore, Congress has seldom attempted to give those Courts any jurisdiction which it had no constitutional right to bestow upon them.

18. Congress Cannot Extend Jurisdiction of Federal Courts Beyond Constitutional Grant.—Nevertheless, some acts have been passed which purported to give the Federal

Courts jurisdiction not included within the judicial power conferred on the United States by the Constitution. Usually when this has been done, it has been due either to careless draftsmanship or to a more or less confused or muddled understanding of some of the provisions of the Constitution itself. Very seldom have the members of the Federal Legislature had any deliberate intention unduly to enlarge the jurisdiction of the Courts of the United States.

The language of the original Judiciary Act by which the Courts were given jurisdiction over all suits to which an alien was a party was one case in which the statute literally interpreted went farther than the Constitution authorized.

19. Congress Cannot Extend Original Jurisdiction of Supreme Court Further Than the Constitution Prescribes.—In the famous case of *Marbury vs. Madison*, 1 Cranch, 175, it was decided that Congress had attempted to confer upon the Supreme Court a jurisdiction not given to that Court by the Constitution. There was no question that the Federal judicial power as defined by the Constitution properly extended to the case for which Congress had sought to provide. The legislative mistake was of a different sort. The Constitution itself defines the cases of which the Supreme Court may take original jurisdiction. It provides that “in all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned” (that is to say, in all other cases to which the judicial power of the United States extends), “the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.”

Without paying sufficient attention to the precise wording of the provision just quoted, Congress had declared that the Supreme Court might issue writs of mandamus to officers of the United States.

Mr. *Marbury* and several other gentlemen had by President *Adams* been appointed justices of the peace for the

District of Columbia. The nominations were confirmed by the Senate, the commissions duly made out and signed by President Adams and given to the Secretary of State for delivery to the persons named therein. Before they were actually delivered a change of administration took place. Mr. Madison, the new Secretary of State, declined to deliver them. Mr. Marbury and the other gentlemen interested sued out in the Supreme Court a writ of mandamus to compel Mr. Madison to do so. The Court held that it was his clear ministerial duty to give the commissions to those named in them; that the performance of such a duty could properly be compelled by mandamus, but that Congress had no power to give the Supreme Court original jurisdiction to issue that writ in any case over which the Constitution did not confer upon that Court such jurisdiction.

20. Constitutional Grant of Original Jurisdiction to the Supreme Court is Not Exclusive.—Congress may not add to the original jurisdiction of the Supreme Court as defined in the Constitution. Is the converse true? May Congress confer any of that jurisdiction on other Federal Courts? In several of the great opinions of CHIEF JUSTICE MARSHALL the power to do so was denied.¹ In none of them was the question directly involved. Whenever it has been the Supreme Court has held that its original jurisdiction is not exclusive.

As early as 1793 the Genoese consul at Philadelphia was indicted in the United States Circuit Court for the District of Pennsylvania for sending a threatening letter to the British Minister. Quite clearly within the constitutional, as within every other sense, he was affected by the prosecution. He contended that the Supreme Court was the only tribunal in which it could be lawfully instituted. The Circuit Court, presided over by JUSTICE CHASE, ruled against him.²

¹ Marbury vs. Madison, 1 Cranch, 137; Osborn vs. United States Bank, 9 Wheat, 820.

² United States vs. Ravara, 2 Dallas, 297.

Section 13 of the original Judiciary Act³ now forms, almost without change of verbiage, section 233 of the Judicial Code.⁴ It reads:

“The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a Court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party.”

In terms it gives other Federal Courts concurrent jurisdiction over some classes of cases of which the Constitution says the Supreme Court shall have original jurisdiction. In 1883 it was expressly decided that such legislation was constitutional. Suits against foreign consuls could be instituted in the District Courts.⁵

The Supreme Court has repeatedly held that its original jurisdiction over suits in which a State is a party is not necessarily exclusive of any which Congress may see fit to confer upon other Federal tribunals.⁶

The construction of the Constitutional grant of original jurisdiction to the Supreme Court is therefore now settled. Congress may not add to it. Other Courts may be permitted to share it.

Practical considerations have had much to do with giving to this clause of the Constitution the construction which it has received. It is not well that the Supreme Court shall be made a tribunal of first instance in any cases other than those expressly mentioned in the Constitution. It may be,

³ Act Sept. 24, 1789, 1, Stat. 73.

⁴ Act of March 3, 1911, in force Jan. 1, 1912, 36 Stat. 1156.

⁵ *Bors vs. Preston*, 111 U. S. 252.

⁶ *Ames vs. Kansas*, 111 U. S. 449.

and often is, convenient that many of them shall be first instituted elsewhere.

AS CHIEF JUSTICE TANEY pointed out in a case he heard on circuit, it hardly could have been the intention of the statesmen who framed our Constitution to require that one of our citizens, who had a claim of even less than five dollars against another citizen, clothed by some foreign government with the consular office, should be compelled to go into the Supreme Court to have a jury summoned in order to enable him to recover it; nor could it have been intended that the time of that Court, with all its high duties, should be taken up with the trial of every petty offense that might be committed by a consul in any part of the United States, that consul, too, being often one of our own citizens.⁷

21. The First Three Rules Limiting Jurisdiction of Federal Courts.—Thus far three general rules have been stated and illustrated:

1. That the Courts of the United States have no jurisdiction except that given them by the Constitution or by statutes passed under the Constitution.

2. That no statute can extend the jurisdiction of any one of these Courts beyond the limits of the grant of judicial power made in the Constitution.

3. That the original jurisdiction of the Supreme Court is fixed by the Constitution itself and cannot be extended by Congress, although it may be shared by other tribunals, State or Federal.

22. Except as to Original Jurisdiction of Supreme Court, the Jurisdiction of Every Federal Court is Statutory.—The fourth great rule is that no Court of the United States, except the Supreme Court, can claim any jurisdiction unless it can point to the particular Act of Congress conferring such jurisdiction upon it. This rule is of great practical importance. The jurisdiction which Congress has in fact

⁷ Gittings vs. Crawford, 10 Fed. Cases, 447.

given to the Federal Courts is but a very small fraction of that which Congress might grant if it would.

23. The Constitutional Grant of Judicial Power is Not Self Executing.—Is the grant of judicial power in the Constitution self executing?

In the case of *Turner vs. Bank of North America*, the suit was between a citizen of Pennsylvania and a citizen of North Carolina. The Constitution declares that the judicial power shall extend to controversies between citizens of different States. The parties to the case actually instituted were citizens of different States. Congress had, however, said that no suit might be brought in the Federal Courts by an assignee of a chose in action unless such suit could have been brought in those Courts had no assignment been made. Could Congress lawfully say that no Court of the United States should exercise jurisdiction over a class of cases clearly within the constitutional grant of judicial power? JUSTICE CHASE in 1799 answered:—

“The notion has frequently been entertained that the Federal Courts derive their judicial power immediately from the Constitution, but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court we possess it, not otherwise; and if Congress has not given the power to us or to any other Court, it still remains at the legislative disposal. * * * Congress is not bound, and it would perhaps be inexpedient to enlarge the jurisdiction of the Federal Courts to every subject in every form which the Constitution might warrant.”¹

A half century later the point was elaborately discussed. It arose in the same way as in the earlier case. The suit was to recover upon a chose in action. The plaintiff acquired it by assignment. He and the defendant were citizens of different States. The original holder of the chose in action was a citizen of the same State as the defendant. If the

¹ *Turner vs. Bank of North America*, 4 Dallas, 10.

statute already referred to was a valid exercise of congressional power, the suit could not be maintained, for the case could not have been brought in the Federal Court had no assignment been made. If it was invalid as limiting a jurisdiction given by the Constitution, the suit was properly instituted. The Supreme Court said:—

“It has been alleged that this restriction of the judiciary act * * * is in conflict with * * * the Constitution and therefore void. It must be admitted that if the Constitution had ordained and established the inferior Courts and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior Court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress having the power to establish the Courts must define their respective jurisdictions. The first of these inferences has never been asserted and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow also that having a right to prescribe, Congress may withhold from any Court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another or withheld from all. The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Courts; consequently the statute which does prescribe the limits of their jurisdiction cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.”²

24. Congress Has Never Provided for the Exercise of More Than a Part of the Judicial Power Given by the Constitution.—The political history of the United States under the Constitution is often summed up as a struggle between those who believe in the strict, and those who believe in the liberal, construction of the powers granted the Fed-

² Sheldon vs. Sill, 8 How. 448.

eral Government by the Constitution. So stated and taken with the limitations, qualifications and exceptions to which all such general and easy summaries of history must always be subject, it has been in the past roughly accurate. Sometimes, however, it is said that the contest has been between those who want a strong and centralized government and those who do not. That is not true. It never has been true. No better proof of its untruth need be given than to tell the story of the way in which Congress has dealt with the jurisdiction of the Federal Courts.

The Federal Government has been for long periods under the control of political parties which did not make strict construction a part of their creed. Nevertheless, there probably never has been an extension of Federal jurisdiction for the mere purpose of extending it. There has always been a real or supposed reason for any enlargement of it which has been made. Usually when the supposed reason has proved to be a bad reason or no reason at all, or has been found no longer to exist, the jurisdiction once given has been withdrawn. National banks are created under the authority of an Act of Congress. As early as 1824 the Supreme Court held¹ that a controversy to which a corporation holding a Federal charter is a party, arises under an Act of Congress. Jurisdiction over such controversies may therefore be lawfully given to the Federal Courts. Our present national banking system dates from the period of the Civil War. It was a time when political feeling ran high. The banks were new institutions. There was much hostility to them. In certain portions of the country there was reason to fear that they would get scant justice from State Court juries. The Act of June 3, 1864, gave to the Federal Courts jurisdiction over all suits to which a national bank was a party. By 1887 national banks were familiar things. Serious hostility on the part of any great number of people had everywhere died out. Congress then provided that national banks should, so far as actions by or against them are concerned, be regarded as citi-

¹ Osborne vs. U. S. Bank, 9 Wheat, 738.

zens of the State in which they are respectively located; and that the Federal Courts shall not have jurisdiction over suits by or against them unless such Courts would have it had the national bank been in fact a citizen of the State in which it was located.

Congress could provide that every controversy between citizens of different States should be tried in the United States Courts. Actually it has always left concurrent jurisdiction over all such cases to the State Courts. It might declare that no matter how trifling may be the amount in dispute between the citizens of different States, the case might at the will of either of them be taken into the Federal Courts. In the original Judiciary Act it said that no case in which the amount in controversy did not exceed \$500, exclusive of interest and costs, should be within their jurisdiction. In 1875 the limit was raised to \$2,000. Since the first of January, 1912, it has been \$3,000.

25. Unnecessary Extension of Jurisdiction of Federal Courts Undesirable.—The unwillingness to extend, the wish to restrict the jurisdiction of the Federal Courts, is natural. Litigation in the Federal Courts is usually more expensive than in those of the States. To many suitors it is more inconvenient. It consumes more of their time and is in that way more costly. It costs more and is more inconvenient because the Federal Courts never sit at more than a relatively few places in a State. There are State Courts in every county. The lawyers living at the county towns at which the Federal Courts do not sit are reluctant to see the jurisdiction of those Courts extended. Since 1787 local prejudice or local patriotism has greatly diminished. There would not now perhaps be any very fierce and unreasoning objection to the transfer of much litigation from the State to the Federal tribunals. But just because there is nothing like so much State jealousy there is far less reason than there was a century and a quarter ago to take from the State Courts the disposition of cases with which they can more cheaply and conveniently deal.

If a New York suitor feels that in a Maryland State Court he may meet a Maryland adversary on equal terms, he will care little whether he may or may not bring his case into a Federal Court.

26. Federal Courts Have No Common Law Criminal Jurisdiction.—As the inferior Federal Courts have no jurisdiction except that expressly given them by statute, they cannot punish as a crime anything which is not made an offense by an act of Congress. In Maryland, as in a number of other States, men are frequently punished for acts which are not forbidden by any statute, but which were crimes at common law. In the years immediately following the adoption of the Constitution, there were those who thought that the Federal Courts might exercise a like jurisdiction. A common law offense had been committed; its effect and perhaps its purpose might have been to obstruct the operations of the Federal Government. Could not the doer be prosecuted in the Federal Courts? One who similarly transgressed against the peace and dignity of a State could in the tribunals of the latter be held to answer for his misdeed.

Libel is a common law misdemeanor punishable by fine and imprisonment. It has never been forbidden by any Act of Congress.

The Connecticut Current was a Federalist paper. On May 7, 1806, it said that the President and Congress had in secret voted a present of \$2,000,000 to Napoleon Bonaparte for permission to make a treaty with Spain. The Federal Grand Jury indicated the proprietors for libel. The defendants demurred. The judges of the trial Court were divided in opinion. They asked the instructions of the Supreme Court. It said:—

“the only question which this case presents is whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute. * * * Of all the Courts which

the United States may under their general powers constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them * * * The only ground on which it has ever been contended that this jurisdiction could be maintained, is that upon the formation of any political body an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it. * * * If admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general Government it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the Court that shall have jurisdiction of the offense.”¹

The doctrine then laid down has never been since seriously questioned, although there has been at least one attempt to limit its application.

27. Independent of Statute, Federal Courts Have No Criminal Jurisdiction Over Offenses Punishable in Admiralty.—In 1847 in the United States Court for the District of Massachusetts, an indictment was returned against the New Bedford Bridge Co. charging it with obstructing the navigation of the Acushnet River. Congress had not then passed any acts forbidding the obstruction of navigable waters and providing for the punishment of one who in that respect transgressed. It has since done so. In the case in question it was claimed that an obstruction to navigation was by the general law of the admiralty a nuisance, criminally punishable. It was argued that admiralty jurisdiction had been given to the United States and that it extended to punish-

¹ United States vs. Hudson & Goodwin, 7 Cranch, 32.

ment of crimes and offenses committed upon navigable waters. MR. JUSTICE WOODBURY, who, on circuit, sat in the case, answered that while Congress might constitutionally provide penalties for offenses of that character, it had not done so. Until it did the Federal Courts could not require anyone to answer criminally for them.¹

28. Federal Courts Have Some Implied Powers to Punish.—In some instances, Courts of the United States may punish without express authority of any Act of Congress so to do. They are Courts. As such they have certain implied powers. If they had not they either could not exist as Courts at all, or could not efficiently do what is required of every Court of justice. To require Congress to enumerate such powers and expressly to confer them upon its Courts would be at once troublesome and useless.

The Supreme Court has said: "Certain implied powers must necessarily result to our Courts of Justice from the nature of their institution. But jurisdiction of crimes against the State is not among those powers. To fine for contempt—imprison for contumacy—enforce the observance of order, etc., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others; and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases, we are of opinion, is not within their implied powers."²

When a Court deals with an alleged contempt, it need not inquire whether that which has been done is also a crime and punishable as such. A penalty imposed for the contempt does not bar a subsequent criminal prosecution for the doing of the same act.³

29. Federal Courts Have Implied Power to Make Rules.—In addition to preserving order, compelling obed-

¹ United States vs. New Bedford Bridge Co., 27 Fed. Cases, 91 (No. 15867).

² United States vs. Hudson & Goodwin, 7 Cranch, 32.

³ *In re Debs*, 158 U. S. 594.

ience and punishing for contempt, the Courts of the United States have other implied powers. Of necessity they have the right to make rules and regulations for the conduct of proceedings before them.

"Such a jurisdiction is essential to, and is inherent in, the organization of Courts of justice."¹

30. Meaning of Statement That Federal Courts Have No Common Law Jurisdiction.—It is sometimes said the Federal Courts have no common law jurisdiction. This is true in the sense which has already been explained. The Federal Courts have only that jurisdiction which has been given them and to the extent to which it has been given. The statement that they have no common law criminal jurisdiction is absolutely accurate. Like other Courts, they can punish only offenses against the sovereignty by whom they are created. That sovereign cannot be offended against in any other way than by breaking the laws made by its legislature, to wit, Congress. Whether breaches of common law rules are in any particular State punishable crimes, is a matter which concerns the State and its Courts. It is no affair of the Federal tribunals.

31. Federal Courts May Have Jurisdiction in Civil Cases to Give Common Law Relief.—None of the Federal Courts, other than the Supreme Court, has any jurisdiction not expressly given it by some Act of Congress. No one of them can say, this controversy is one over which the Court of King's Bench always had jurisdiction, therefore we have it. In this sense the Federal Courts have no common law civil jurisdiction. Nevertheless, in civil cases it may be their duty to apply and in a sense to enforce State laws, written and unwritten.

The Constitution declares that the judicial power of the United States shall extend "to controversies between citizens of different States; and to controversies between a State

¹ Eberly *et al.* vs. Moore, 24 How. 158.

or the citizens thereof and foreign States, citizens and subjects."

There is no limitation as to the sorts of controversies between the parties named. If they may be fought out in the State Courts and arise between the persons described in the Constitution, Congress may give the Federal Courts jurisdiction over them. In many of the States, Maryland being one, most of the suits at law are common law actions. They are in assumpsit or in debt, in trespass or in case, in trover or in replevin. The rights of parties to them are still largely governed by common law principles, more or less modified by statute. Congress has given to its Courts jurisdiction over civil suits between citizens of different States or between citizens of a State and foreign States, citizens or subjects when the amount in controversy exceeds a fixed sum. Such a controversy may and often does take the form of a common law action. The law applied by the Federal Court to its determination may be the common law. If the common law has been changed by the statutes of the State whose law governs the transaction, the Federal Court will apply it as it has been so modified.

In the sense above stated, therefore, the Federal Courts have and daily exercise a common law civil jurisdiction.

Whenever a citizen of one State has upon a citizen of another State what is in the State Courts an actionable demand, whether made so by statute or because it is actionable at common law, he may seek redress in the Federal Courts, provided the amount in controversy is sufficiently large and the parties are citizens of different States.¹

32. There is a Federal Common Law on Some Subjects.—The common law is always in the making. Decisions add new rules and change old. This process is in operation in every State in which the common law itself exists. All Courts cannot see everything in quite the same light; consequently the common law is no longer the same in all the States; in none of them, perhaps, is it precisely what the common law of Eng'land now is. In determining what is the

¹ State of Pennsylvania vs. Wheeling Bridge Co., 13 How. 563.

applicable common law, the Federal Courts on most subjects will follow the decisions of the highest Court of that State to whose law the particular transaction under consideration is subject. The same Court of the United States may, on Monday, hold that the common law requires a particular case to be decided in one way, and, on Tuesday, that another controversy in which the facts are legally identical shall be determined in another; there may be no other difference than that Monday's suit is governed by Maryland law and Tuesday's by that of Virginia.

There are, however, some classes of questions upon which the Federal Courts will take their own view as to what the common law is, irrespective of any decisions of the State Courts. On such matters, the Supreme Court has the last word. Through its deliverances, the rulings of the Federal Courts are kept uniform throughout the country. In this way, so far as concerns the subjects upon which the Courts of the United States do not feel bound to follow the State Courts, there has been built up something which may not inaptly be called Federal common law.

Further discussion of this interesting and important topic is postponed to a later chapter.

33. Common Law Definitions Are Accepted by the Federal Courts.—The Federal Courts habitually look to the common law for definition of the words used by Congress and by the legislatures of the various States.¹

If Congress says that larceny from the United States, or from anyone, within a place under the exclusive jurisdiction of the United States, shall be punished, the Courts turn to the common law to find out what the crime of larceny is. Persons accused of crime, and parties to civil actions at law where the amount involved is twenty dollars or upwards, are entitled to trial by jury. In determining what a trial by jury is, and what the respective provinces of Court and jury are, the common law governs.

Some of these qualifications of the two rules—first, that the Federal Courts have no common law jurisdiction, and,

¹ Rice vs. R. R. Co., 1 Black, 374.

second, that there is no Federal common law—are important. They will be hereafter discussed.

34. Federal Courts in Equity Cases Administer a Common Law of Chancery.—What has thus far been said as to the common law has been said with reference to law as distinguished from equity. The Constitution recognizes the difference between the two. By its amendments the right to trial by jury is secured to parties to civil actions at common law involving more than twenty dollars. This provision is not applicable to proceedings in equity.

It follows that in the Federal Courts the distinction between law and equity must be maintained. Even prior to the adoption of the Constitution, there were States which did not keep the two systems separate. In all, or nearly all, of the States, statutes have since, to a greater or less extent, broken down the barriers between them. The Supreme Court, under these conditions, was compelled to determine how the constitutional distinction could be preserved.

35. In the Federal Courts the Line Separating Law From Equity is Drawn Where it was in England in 1789.—It solved the problem by declaring that the framers of the Constitution must have had in mind the contemporary English practice, and that in the Federal Courts the line of division between law and equity must be drawn where in 1789 the High Court of Chancery drew it.

Massachusetts had no Court of Equity. A bill which revealed a case of equity jurisdiction was filed in the Circuit Court of the United States for the District of Massachusetts. The Supreme Court by the mouth of CHIEF JUSTICE MARSHALL, said:—

“As the Courts of the Union have a chancery jurisdiction in every State and the Judiciary Act confers the same chancery powers on all and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States.”¹

¹ United States vs. Howland, 4 Wheat, 115.

The same doctrine is more elaborately stated in the case already cited of *State of Pennsylvania vs. Wheeling Bridge Co.*²

It was there said:—

“Chancery jurisdiction is conferred on the Courts of the United States with the limitation that ‘suits in equity shall not be sustained in any of the Courts of the United States in any case where plain, adequate and complete remedy may be had at law. The rules of the High Court of Chancery of England have been adopted by the Courts of the United States. * * * In exercising this jurisdiction the Courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no Court of Chancery has been established. The usages of the High Court of Chancery in England whenever the jurisdiction is exercised govern the proceedings. This may be said to be the common law of chancery, and since the organization of the Government it has been observed.”

² *State of Pennsylvania vs. Wheeling Bridge Co.*, 13 How. 563.

CHAPTER II.

THE ORGANIZATION OF THE FEDERAL JUDICIAL SYSTEM.

36. The Supreme Court.—The Constitution provides for a Supreme Court and defines the limits of its original jurisdiction.

37. The Appellate Jurisdiction of the Supreme Court is Such as Congress Sees Fit to Give.—The Constitution declares that in all cases of which the Supreme Court has not original jurisdiction it “shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make.” That is to say, it has such appellate jurisdiction as Congress sees fit to give it. It follows that what Congress has given, Congress may take away.

One *McCardle*, after the close of the Civil War, was arrested by the military authorities of the United States. Under the alleged sanction of the Reconstruction Acts, he was held in custody for trial by a military commission, for disturbances of the public peace in inciting to insurrection, disorder and violence, for libel and for impeding reconstruction. He applied for a writ of habeas corpus to the Circuit Court of the United States for the District of Mississippi. He was remanded to the custody of the military authorities. He appealed to the Supreme Court of the United States. The Government moved to dismiss his appeal; contending that an order of a Circuit Court denying a writ of habeas corpus was not appealable. The Supreme Court denied the motion; holding that by statute the right to appeal was expressly given.¹ It fully heard the case upon the merits. The argument, which lasted over four days, was not concluded until the 9th of March, 1867. Congress was at the very height of its conflict with President Johnson.

¹ *In re McCardle*, 6 Wall. 318.

It wished to be free to make further use of military commissions for the maintenance of order and for the enforcement of its policies in what it was then in the habit of calling "the States lately in rebellion."

On the 27th of March, 1868, that is eighteen days after the conclusion of the argument in the case, but before the Court had announced any decision, Congress, over the veto of the President, repealed the Act which the Supreme Court had held gave it jurisdiction. The Court thereupon announced that it was "not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words." The Court cited with approval its own language in a much earlier case² to the effect that while the appellate powers of the Supreme Court are not given by the Judiciary Act, but by the Constitution, they are, nevertheless, limited and regulated by that Act and by such other Acts as have been passed on the subject. The Judiciary Act was an exercise of the power given by the Constitution to Congress of making exceptions to the appellate jurisdiction of the Supreme Court. Congress had described affirmatively the jurisdiction of the Court, and this affirmative description was understood to imply a negation of the exercise of such appellate powers as were not comprehended within it.

The Court concluded "it is quite clear, therefore, that this Court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."³

38. The Organization of the Supreme Court.—By the original Judiciary Act¹ the Supreme Court was composed of one Chief Justice and five Associate Justices.

² *Durousseau vs. United States*, 6 Cranch, 312.

³ *In re McCordle*, 7 Wall. 506.

¹ Sept. 24, 1789, 1 Stat. 73.

By the Act of February 13, 1801,² the number of Associate Justices was reduced, after the next vacancy should occur, to four. This Act was speedily repealed.

By the Act of February 24, 1807,³ the number of Associate Justices was fixed at six, thus giving the Court seven members.

Thirty years later⁴ the number of Associate Justices was raised to eight, and by the Act of March 3, 1863,⁵ to nine.

Congress on the 23rd of July, 1866,⁶ provided that no vacancy in the office of Associate Justice of the Supreme Court should be filled by appointment until the number of Associate Justices should be reduced to six, and that thereafter the Supreme Court should consist of a Chief Justice and six Associates.

The purpose of this last enactment was to prevent President Johnson making any appointments to the Supreme Bench during the remainder of his term of office. His successor had been only five weeks in the White House when the number of Associate Justices was raised to eight, at which number it has ever since remained.⁷

39. Jurisdiction of the Supreme Court.—It will be unnecessary to add anything to that which has already been said as to the original jurisdiction of the Supreme Court. The appellate jurisdiction now exercised by it can be more conveniently considered in a later chapter.

40. The District Courts of the United States.—By the original Judiciary Act of 1789, District Courts were created, one for each of the thirteen districts into which by the Act the eleven States then in the Union were divided. From time to time the number of districts, and with them the number of District Courts, has been increased. At the

² 2 Stat. 89.

³ 2 Stat. 420, sec. 5.

⁴ Mar. 3, 1837, 5 Stat. 176.

⁵ 12 Stat. 794.

⁶ 14 Stat. 209.

⁷ Apr. 10, 1869, 16 Stat. 44.

present time there are seventy-eight, or precisely six times as many as there were in 1789.

No district crosses State lines and no district ever has crossed State lines—that is, each district is now, as always, wholly within the boundaries of a single State. Maryland and twenty-one other States have only one district each; Virginia and seventeen others are divided into two each; Pennsylvania and three others into three each, while in New York, as in Texas, there are four.

41. District Judges.—As a rule, there is a separate District Judge for each district. In three States there is, however, only one District Judge for two districts; he is the District Judge in and for each. Until relatively recently there was never more than one District Judge in a single district. When the business in a district became too large to be handled by one Judge, the old practice was to divide it. With the great modern concentration of population in limited areas, it has been found more convenient in some instances to appoint two or more District Judges for the same district. In each of a dozen or more districts there are now two District Judges. In the Southern District of New York there are four.

42. The Supreme Court and the District Courts Have Been Permanent.—Since the first organization of the judicial system of the United States there have always been a Supreme Court and District Courts. The organization of each has remained substantially unchanged.

43. The Circuit Courts.—By the original Judiciary Act Circuit Courts were established in each district. They had an uninterrupted existence of more than one hundred and twenty years. The Act which abolished them became effective January 1, 1912. The title of these Courts was not actually a misnomer, but it was capable of giving a false impression. It often did. The country has always been divided into circuits of considerable size, extending over

several, sometimes over many, States. From 1789 to 1869, with the exception of a little over twelve months, between February, 1801, and March, 1802, the only Federal Judges were the Justices of the Supreme Court and the District Judges. If there were to be Courts of higher rank than those of the District, their work had to be done in whole or in part by the Justices of the Supreme Court. In order that this duty might be apportioned in some orderly fashion among them it was expedient that the country should be divided and particular Justices assigned to each of such divisions—that is to say, each of such divisions constituted the circuit of a particular Supreme Court Justice. The appellation “Circuit Court” suggests that such tribunal has jurisdiction throughout the circuit. That, in point of fact, it never had. Its writs and processes did not run beyond the district in which it was held. The full and accurate title of the Circuit Court in this State was the Circuit Court of the United States for the District of Maryland. For many years Maryland and Virginia have formed part of the same Federal circuit. Nevertheless, the Circuit Court for the District of Maryland was as distinct in every way from that for either of the districts into which Virginia is divided as it was from the Circuit Court for the District of Oregon.

The word circuit had no reference whatever to the territorial extent of the Court’s jurisdiction. Indeed, it was purely arbitrary so far as concerned the Court itself as distinguished from the Judges who might hold it.

44. Circuit Courts From 1789 to 1801.—At first there were only three circuits, the Eastern, the Middle and the Southern. The last-named comprised only two States, South Carolina and Georgia. It is significant of the essentially frontier conditions which one hundred and twenty-five years ago prevailed throughout the greater part of those Commonwealths that the assignment to the Southern Circuit was universally held to be burdensome. To ride circuit in that part of the country was very hard work. It is true there was not much to be done by a Federal Judge when he reached any one of his various Court houses. To get to them at all required

long and exhausting journeys which to elderly men were dangerous.

Originally the Supreme Court had six members. Two of them were accordingly assigned to each circuit. These two, together with the District Judge of the district, were required to hold in each district a Circuit Court twice in each year. To make a Court at least two of the three had to be present. Under the conditions of travel then prevailing, the Supreme Court Justices must have spent the larger part of their time in public or private conveyances or on horse-back. It is not surprising that at this period many gentlemen declined appointments to the Supreme Bench; one citizen of Maryland preferred to take the post of Chancellor of that State, and many of the earlier Justices of the Supreme Court resigned after a few months or a few years of service. If there had been any considerable number of cases to be disposed of either on circuit or by the Supreme Court the system would have been utterly unworkable. As a matter of fact, the Supreme Court had hardly anything to do and the Circuit Courts not much more. John Jay while Chief Justice was also Minister to England, and Oliver Ellsworth, while holding the same high judicial post, represented us in France. John Marshall for some little while was both Secretary of State and Chief Justice. Samuel Chase, of Maryland, found time while an Associate Justice to canvass his State in advocacy of the re-election of President Adams.

As originally constituted the Circuit Courts exercised both original and appellate jurisdiction. In 1891 the latter was taken from them and for the remaining twenty years of their existence they were Courts of first instance and nothing more.

It will be unnecessary here to discuss the jurisdiction, both original and appellate, which at different times they had. It will tend to clearness if attention be confined to the changes which from time to time were made in their organization.

45. Circuit Courts Under the Act of February 13, 1801.—As has been said, the conditions under which circuit

work had to be done were very trying. As a rule, the Supreme Court Justices heartily disliked it. There was a doubt as to whether under a strict construction of the Constitution a Justice of the Supreme Court could be required to sit in an inferior tribunal. It was often impossible for either of the Justices of the Supreme Court to get to the place fixed for holding the Circuit Court in a particular district at the time designated by law. Some changes in the original scheme had by 1801 become necessary. The Federalists were about to lose control of President and of Congress. They wished to insure that for an indefinite time to come the Courts of the United States would be in the hands of those whom they would have described as men of "sound principles"—that is, good Federalists. On February 13, 1801, less than three weeks before they went out of power; as it turned out forever, they passed an Act for the more convenient organization of the Courts of the United States.¹ By it the Circuit Court system was radically altered. They increased the number of districts to twenty-two and directed the establishment of a District Court in each. They doubled the number of the circuits. The geographical grouping of the States, then made, is very similar to that now in force. The first six of the present circuits are today constituted very much as they were by the Act of 1801. For each of these circuits, except the sixth, they directed that there should be appointed three new Judges to be called Circuit Judges. In the Sixth Circuit there was to be only one such Judge. The Justices of the Supreme Court were no longer to sit in the Circuit Courts. This was not a bad system. If all original jurisdiction had been given to the District Courts and the Circuit Courts made appellate tribunals purely, the organization would have been substantially the same as that which now exists. It was then doubtless far more elaborate than the needs of the country required. The Federal Courts were very unpopular with the party about to come into power. The appointment of a large number of distinguished Federalists to life positions was even less to its liking. President Adams promptly

¹ 2 Stat. 89.

exercised the powers conferred on him by this Act. New District and Circuit Judges were appointed and promptly confirmed by a Federal Senate. These were the gentlemen whom the Jeffersonians dubbed the "Midnight Judges."

46. Circuit Courts Under the Act of April 29, 1802.

—A year later the victorious Democrats, or Republicans as they then called themselves, repealed the Act of 1801.¹ By the express provisions of this statute all laws relating to the Federal judiciary changed by the Act of February 13, 1801 were re-enacted. Thus things were put back precisely where they had been thirteen months earlier. Some changes in the organization prescribed by the original Judiciary Act had become absolutely necessary. They were made a couple of months later by the Act of April 29, 1802.² By it six circuits were again established, although with different boundaries. The Circuit Courts no longer consisted of two Justices of the Supreme Court and of a District Judge. Only one Justice were assigned to each circuit. He and the District Judge might hold the Court together, or either could act alone, except that the appellate jurisdiction of the Circuit Court could be exercised only by the Circuit Justice, as a Justice of the Supreme Court sitting on circuit has always been styled. When in other cases the District Judge differed from the Circuit Justice, the question as to which they disagreed was certified to the Supreme Court for its determination. With the growth of the business of the Supreme Court itself, with the expansion of the country, and therefore with the increase in the number of districts, more and more of the work of holding the Circuit Courts fell upon the District Judges. Except for additions to the number of circuits, this system remained unchanged for sixty-seven years.

47. Justices of the Supreme Court Can Be Constitutionally Assigned to Circuit Duty.—In 1803 the Supreme Court was called on to say whether its members could

¹ March 2, 1802, 2 Stat. 132.

² 2 Stat. 156.

constitutionally be assigned to sit in the Circuit Courts without being specially appointed and commissioned as Judges of the latter. It held that "practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."¹

48. The Circuit Courts Under the Act of April 10, 1869.—In the nearly three score years and ten which elapsed between the close of the administration of the first Adams and the beginning of that of General Grant, the area of the country more than trebled and its population multiplied seven-fold. The great changes which the war had brought about in the relations of the States and the Nation, and the enormous increase of interstate business which followed upon the development of our railroad system, had combined to increase immensely the volume and importance of the business which the Federal Courts were called upon to transact. These Courts were still organized as they had been at the beginning of the century. There were more districts and there were nine circuits where there had been but six, but beyond that no provision had been made for disposing of the greatly increased work which had to be done.

By the Act of April 10, 1869,¹ the President was authorized to appoint a Circuit Judge in each of the nine circuits. He was to have within his circuit all the powers which had been exercised by the Circuit Justice assigned to it. It was not the intention of Congress that the latter should be altogether relieved from circuit duty. He was to continue to sit, when he could, in the Circuit Court. A special section of the Act provided that it should be the duty of the Chief Justice and of each Justice of the Supreme Court to attend at least one term of the Circuit Court in each district of

¹ *Stuart vs. Laird*, 1 Cranch, 298.

² 16 Stat. 44.

his circuit during every period of two years. This requirement remained on the statute book for more than forty years. During most of the latter part of that period it was little regarded.

The distinguished Justices of the Supreme Court were law-abiding citizens. As a rule they were hard workers, yet their days were only twenty-four hours long. The burdens of the Supreme Court became more and more onerous. It was simply impossible for its members to do circuit duty without neglecting the still more important work of the Supreme Court itself. A quarter of a century ago that Court was taxed beyond its capacity. In ordinary course it was several years after a case was docketed before it was reached for argument. Every year the Court fell further and further behind. Something had to be done. By the Act of March 3, 1891,² intermediate Courts of Appeal were established, one in each circuit.

The same Act took from the Circuit Courts all appellate jurisdiction.

After the passage of the Circuit Court of Appeals Act there was, therefore, in each district two distinct Courts—the Circuit and the District—each of which was a Court of original jurisdiction only.

49. The Abolition of the Circuit Court.—In nearly all of the circuits the time and strength of the Circuit Judges were largely taken up by the work of the Circuit Court of Appeals. The Circuit Courts were ordinarily held by District Judges. In every district both the Circuit and District Courts had the same Marshal. In most of them the same clerk. There was no substantial reason for their separate existence. Accordingly, the Judicial Code provided that on the 31st of December, 1911, the Circuit Courts should be abolished. All their business and jurisdiction were transferred to the District Courts.

While they existed the Circuit Courts had original jurisdiction exclusive of that of the District Courts, of all the more important civil causes cognizable in the Federal Courts, other than those in admiralty and in bankruptcy.

² 26 Stat. 826.

50. Circuit Courts of Appeals.—As before stated, Circuit Courts of Appeals were created by the Act of March 3, 1891. There is one of them in each circuit. The Act which established them provided for the appointment of an additional Circuit Judge in each circuit. The Circuit Court of Appeals was to be composed of three Judges. If the Circuit Justice was present and both the Circuit Judges and no one of them was disqualified, the Court was made up of those three. The Circuit Justice was seldom at hand—perhaps not oftener than at one hearing out of a hundred. At that time the Circuit Judges still occasionally sat in the Circuit Courts. It sometimes happened that the appeals to be heard were from decisions or orders made by them. In such cases they could not sit in the appellate tribunal. It was therefore provided by law that the District Judges within each circuit should be competent to sit in the Court according to such order or provision among them as either by general or particular assignment should be designated by the Court. In this, and doubtless in the other circuits, it has been the practice of the Circuit Court of Appeals to designate the District Judges of the Circuit to sit in turn in the appellate tribunal.

In most of the circuits the number of Circuit Judges has been from time to time increased, so that in the Second and Eighth there are now four Circuit Judges and in all the other circuits, except the Fourth, three. In this circuit there are still but two, although JUDGE KNAPP, of the former Commerce Court, is now regularly assigned to it. For the moment, therefore, we have three Judges. A very considerable part of the work of the Circuit Court of Appeals of this circuit has in the past fallen upon the District Judges.

By law never more than three Judges sit in the Circuit Court of Appeals. The Court may be held by two Judges and occasionally is. It is far better that three shall sit. If a case is heard by two and they happen to differ in opinion, either the decree below is affirmed by a divided Court, or, more usually, a re-argument is ordered. Neither alternative is in itself desirable.

51. No Judge May in the Circuit Court of Appeals Hear an Appeal From Himself.—When Justices of the Supreme Court went on circuit and heard cases in the Circuit Courts, there was no rule of law which forbade their taking part in the hearing and decision of an appeal or writ of error from their judgment or decree. In earlier years it was not unusual for them to do so. Now they seldom sit below at all. In our day when Circuit and District Judges have been promoted to the Supreme Bench they usually have been careful to have nothing to do with appeals in any case in which they sat below. They have the legal right so to do if they wish. They have usually thought it well to refrain. When the Circuit Courts of Appeals were created it was expressly provided that no Justice or Judge before whom a cause or question may have been tried or heard in a District Court or existing Circuit Court shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals. This provision of law has recently been construed by the Supreme Court of the United States, and it has held that no member of the Circuit Court of Appeals may sit in any case in which there is to be reviewed any order or decision made by him below.¹

52. Jurisdiction of the Circuit Court of Appeals.—These Courts were intended primarily to relieve the Supreme Court. Accordingly, most, though not all, appeals from the District Courts are taken to the Circuit Court of Appeals. A few cases may still be taken directly from the District Court to the Supreme Court.

A discussion of the appellate jurisdiction of the Federal Courts is reserved for a later chapter.

53. The Circuits.—There are at present nine circuits. Since 1802 there have always been precisely as many circuits as there were Justices of the Supreme Court. Since 1837, as we have seen, that number has been nine, except for a period of about six years from 1863 to 1869, when it was ten. The present nine circuits are very unequal, both in

¹ *Rexford vs. Brunswick-Balke-Collender Co.*, 228 U. S. 339.

population and in area. Thus, the First is made up of Maine, New Hampshire, Massachusetts and Rhode Island. It has an area of little more than 50,000 square miles. Its population is about five millions. As it has only four District Judges it may be assumed that the volume of Federal litigation in it is not great. The Eighth Circuit, on the other hand comprises twelve States, any one of which is nearly or quite as large as the entire First Circuit. It extends from the Canadian boundary of Minnesota and North Dakota to the Mexican border of New Mexico. It has more than fifteen million inhabitants. There are eighteen District Judges in it. Some re-arrangement of the circuits would seem to be desirable.

54. The Fourth Circuit.—Maryland is in the Fourth Circuit, which includes beside it the Virginias and the Carolinas. It is divided into nine districts—that of Maryland, the Eastern and the Western Districts of Virginia, the Northern and Southern of West Virginia, the Eastern and Western of North Carolina, and the Eastern and Western of South Carolina. As the law provides that the same Judge shall be the Judge of both districts in South Carolina, there are only eight District Judges for the nine districts of this circuit.

55. Federal Courts of Special Jurisdiction.—As has been stated, the jurisdiction of a District Court is limited to its district, and of a Circuit Court of Appeals to its circuit, but there are other inferior Courts of the United States whose writ runs throughout the Union, but whose jurisdiction is limited to special classes of cases. There are two such tribunals—the Court of Claims and the Court of Customs and Appeals.

56. The Court of Claims.—The Court of Claims was originally established by the Act of February 24, 1855,¹ for the purpose of hearing and determining all claims founded upon any law of Congress or upon any regulation of an executive department, or upon any contract, express or im-

¹ 10 Stat. 612.

plied, with the Government of the United States; or which might be referred to it by either House of Congress. It was created for the "triple purpose of relieving Congress and of protecting the Government by regular investigation and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims."² Originally it was a Court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.³ In 1863 the number of its Judges was increased from three to five. Its jurisdiction was somewhat enlarged. Instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to the Supreme Court, and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant.⁴

Subsequent to the passage of the Act of 1863, the Supreme Court held that the Court of Claims was not one of the inferior Courts of the United States within the constitutional meaning of that phrase.

That Act had provided that a claimant whose claim had been allowed by the Court, or upon appeal by the Supreme Court, should be paid out of any general appropriation made by law for the payment and satisfaction of private claims, but no payment was to be made until the claim allowed had been estimated for by the Secretary of the Treasury, and Congress upon such estimate had made an appropriation for its payment.

Neither Court could by any process enforce its judgment. Whether that should be paid or not did not depend on the decision of either Court, but upon the future actions of the Secretary of the Treasury and of Congress. There was no question that Congress could create the Court of Claims. No harm was done by calling it a Court. Congress can establish tribunals with special powers to examine testimony and decide in the first instance upon the validity and justice of any claim against the United States. It may lawfully subject the decisions of such tribunals to the

² United States vs. Klein, 13 Wall. 144.

³ United States vs. Klein, *supra*; Gordon vs. United States, 2 Wall. 561.

⁴ Act March 3, 1863, 12 Stat. 765; 117 U. S. 697.

supervision and control of Congress or of the head of any of the executive departments.

The Supreme Court said that by the Constitution, Congress may authorize appeals to it only "from such inferior Courts as Congress may ordain or establish to carry into effect the judicial power specifically granted to the United States. The inferior Court, therefore, from which the appeal is taken must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it unless appealed from." * * * "Congress cannot extend the appellate power" of the Supreme Court "beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority and duty of hearing and determining an appeal from a commissioner or auditor or any other tribunal exercising only special powers under an Act of Congress, nor can Congress authorize and require the Supreme Court to express an opinion on a case where its judicial power could not be exercised and where its judgment could not be final and conclusive upon the rights of the parties."

Subsequently the objectionable part of the Act of 1863 was repealed.⁵ Thereafter judgments of the Court of Claims were held to be final judgments, subject to be affirmed or reversed on appeal to the Supreme Court. It is true that they can not be enforced against the United States, if Congress does not see fit to appropriate money for their payment, because there is no other process known to the law by which money in the treasury of the United States can be taken out of it. The fact that a suitor before a Court may be execution proof does not make the investigation and determination of a claim against him any less a judicial matter. The Court of Claims is now one of the inferior Courts of the United States.⁶ Its jurisdiction will be later discussed.

57. Court of Customs Appeals.—The Court of Customs Appeals was established by the Act of August 5, 1909.¹ It consists of a presiding Judge and four Associates. It was

⁵ Act March 17, 1866; 14 Stat. 9.

⁶ United States vs. Klein, *supra*.

¹ 36 Stat. 105.

created for the purpose of reviewing on appeal final decisions of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of merchandise, the rate of duty imposed thereon under such classification and the fees and charges connected therewith, and upon all appealable questions as to the jurisdiction of such board, and as to the law and regulations governing the collection of the customs revenue. The decisions of the Court of Customs Appeals are in most cases final; in some of exceptional importance its action may be reviewed by the Supreme Court.² The purpose of its creation was to relieve the then existing Circuit Courts of the United States of the labor of passing upon questions as to the classification of merchandise under the tariff Acts and the rates of duty to which various articles were liable. The Circuit Courts in different circuits and the Circuit Courts of Appeal therein might well give different answers to the same question. Uniformity in customs administration could in that event be secured only by carrying the controversy to the Supreme Court of the United States. Its time is too valuable for much of it to be taken up with such questions. In matters of taxation it usually does not make so much difference what the rate is, as it does whether it is certain and uniform.

58. Commerce Court.—This Court was created by the Act of June 18, 1910.¹ It had jurisdiction over most proceedings to enforce, and over all to enjoin, set aside, annul or suspend, any order of the Interstate Commerce Commission. It was composed of five Judges, specially appointed in the first instance by the President. They became by virtue of such appointment Circuit Judges of the United States. One of these Judges was to sit in the Commerce Court for a year, another for two, a third for three, a fourth for four and a fifth for five years. At the expiration of the term of each of them he was to be sent to some circuit to be designated by the Chief Justice of the United States, and a Circuit

² Act of Aug. 22, 1914.

¹ 36 Stat. 539.

Judge, also to be selected by the Chief Justice, was to be assigned to take his place in the Commerce Court. The impeachment of one of its Judges and the subsequent provision of an Act of Congress that no appointment should be made to fill the vacancy, reduced the number of its members to four. The Court was itself abolished by a provision of the deficiency appropriation bill of October 22, 1913. It was provided that the Judges of the Court should remain Circuit Judges of the United States, and should from time to time be designated to sit by the Chief Justice of the United States in different districts or circuits.

CHAPTER III.

THE CRIMINAL JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS.

59. Jurisdiction of the Several Courts of the United States.—The organization of the United States Courts has been sufficiently discussed. The jurisdiction of each of them must next be considered.

60. The District Courts.—The District Courts are, for most matters, the only Federal Courts of original jurisdiction. The Supreme Court has original jurisdiction over the few cases named in the Constitution. The Court of Customs Appeals does not, it is true, hear appeals from other Courts, but it deals only with matters or issues which have been previously passed upon by the Board of General Appraisers. The last named is technically an administrative board. Its functions and modes of proceeding are not unlike those of a Court. The Court of Claims is not in any sense an appellate tribunal, but it has jurisdiction of only one class of controversies.

There are certain kinds of actions and proceedings within the grant of judicial power to the United States, which may not be brought in the State Courts at all. There are others which at the option of the parties may be instituted in either the State or the Federal tribunals.

61. The Exclusive Jurisdiction of Courts of the United States.—By the Judicial Code the jurisdiction of the Courts of the United States is made exclusive in eight classes of cases, viz:—

1. Crimes and offenses cognizable under the laws of the United States.
2. Penalties and forfeitures under those laws.
3. Civil causes of admiralty and maritime jurisdiction.

4. Seizures under the laws of the United States otherwise than in admiralty and prizes brought into the United States.

5. Cases under the patent or copyright laws.

6. All matters and proceedings in bankruptcy.

7. All controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States or aliens.

8. (a) All such suits and proceedings against ambassadors or other public ministers, their domestics or domestic servants as may consistently with the law of nations be entertained by a Court of law.

(b) Suits and proceedings against consuls or vice-consuls.

Exclusive original jurisdiction over the first six of these is conferred upon the District Courts. The Supreme Court is given such exclusive original jurisdiction over the seventh class and over "a" subdivision of the eighth class. The Supreme and the District Courts have concurrent original jurisdiction over the "b" subdivision of the last named.¹

62. District Courts Have Exclusive Jurisdiction to Enforce the Criminal, Penal and Quasi Penal Legislation of the United States.—It is only in its own Courts that the United States may proceed to enforce its own criminal, penal or quasi penal legislation. The District Courts have, therefore, exclusive jurisdiction of all crimes and offenses against the United States, of all suits for penalties and forfeitures incurred, and of all seizures made under the laws of the United States.

63. Every Criminal Prosecution in the United States Court Must Charge the Violation of a Specific Federal Statute.—Because the Federal Courts have no common law criminal jurisdiction, every prosecution in them must charge the violation of some specific Federal statute. The District Attorney usually endorses on the indictment or information a reference to the statute under which it is framed. This endorsement is not a part of the indictment.

¹ Judicial Code, sections 256 and 233.

The District Attorney may make a mistake. He may suppose that what is charged in the indictment is a violation of a particular statute when it is not. The indictment will be good for all that, if what it says the accused did constitutes a violation of some other Federal statute.¹

64. Such Statute Must Be Constitutional.—Not only must an indictment or information charge the defendant with having broken a Federal statute, but that statute must be one which Congress had the constitutional power to enact. The right of the United States to punish at all depends either upon the nature of the thing done or upon its having been done in a particular place.

65. Congress Can Provide for the Punishment of One Who Anywhere Interferes with the Exercise of a Power Given to the Federal Government.—Most of the powers granted the Federal Government may be exercised without other territorial limitations than those imposed by international law. Congress can declare that anyone who anywhere interferes with the exercise of any of its powers will commit a crime, and it can fix the punishment therefor. For example: Congress has the power to establish postoffices and post roads. It may provide for the punishment of anyone who in any way interferes with the mails or who tries to send, through the mails, things which it says shall not be so sent. Congress has no power to punish one man for obtaining property from another by false pretenses, unless, perhaps, the transaction is a part of interstate commerce. It can say that no one with intent to cheat another shall put any letter into the mails at Baltimore. It will make no difference whether the letter so mailed is directed to an address in the same city or to one in Seattle; the offense against the Federal laws has been equally committed in either case.

66. How Far May Congress Go to Prevent Interference With the Exercise of Federal Power?—How far may Congress go to prevent interference with the proper

¹ Williams vs. United States, 168 U. S. 382.

exercise of a Federal power? For example, may it punish anyone who at any place assaults a Federal official who is not at the moment engaged in any official duty?

Immediately after the assassination of President McKinley this question was much discussed. The controversy is referred to now merely because it illustrates the rule that an act done within territory over which the exclusive jurisdiction of the United States does not extend cannot be made a crime by Congress unless it may in the fair exercise of the legislative discretion be supposed to obstruct the exercise of some of the powers committed to the Federal Government.

Those who are interested in the question of how far the United States may go in protecting its officials will find entertainment as well as profit in reading *In re Neagle*.¹

The career of JUDGE TERRY, who was shot down by Deputy Marshall Neagle at the moment he was about to attempt to kill JUSTICE FIELD, of the Supreme Court, and that of his wife, better, if not more favorably, known by one of her former names, as Sarah Althea Hill, were as full of thrilling adventures as were those of any of the heroes or villains of Dumas.²

67. Power of Congress to Punish Crimes Committed in Particular Localities.—In the territories of the United States, in the District of Columbia and in all those numerous places ceded to the United States by the consent of the States for the purposes of the Federal Government, Congress has exclusive jurisdiction. Over them it has all the powers of any other sovereign legislature, limited only by the restrictions in favor of individual liberty imposed by the Constitution of the United States. By the express language of the Constitution its jurisdiction is exclusive. If two men get

¹ 135 U. S. 1.

² *Sharon vs Hill*, 20 Fed. 1, 22 Fed. 28, 23 Fed. 353, 24 Fed. 726, 26 Fed. 337, 26 Fed. 722; *Sharon vs. Terry*, 36 Fed. 337; *In re Terry*, 36 Fed. 419; *Ex parte Terry*, 128 U. S. 289; *Terry vs. Sharon*, 131 U. S. 40.

into an altercation in the Postoffice Building in Baltimore, or if a civilian commits any offense within the grounds of the Naval Academy at Annapolis, the offenders are punishable by the United States District Court for the District of Maryland, and by it alone.

68. Offenses Against Federal Laws Can Be Punished by the District Court Only.—It is quite possible that Congress might confer upon the United States Commissioners powers to deal summarily with petty offenses;¹ out of tender regard for the liberty of the citizen it has never done so. One who commits a trivial assault or breach of the peace in any place within the exclusive jurisdiction of the United States must be proceeded against in the United States District Court for the district. He cannot be put on trial until an indictment or information has been returned against him. A fine of from \$1 to \$5 may be adequate punishment for anything that he has done. It may be impossible for the Government to punish him at all unless at an expenditure fifty or a hundred times as great. The national legislature may in this matter have acted wisely. In exceptional cases the result may be unfortunate. A poor and friendless person may be charged with some trifling offense; and may be unable to give bail; it may be days, weeks or, in exceptional circumstances, months before his case can be disposed of. If the committing magistrate were authorized to pass upon the issues involved, the guilt or innocence of the accused might be at once determined. If found guilty he might be less severely punished than he will in fact be, if he be held in prison until he is acquitted by the District Court.

69. Places Within the Jurisdiction of the Federal Government Rapidly Increasing.—At every session of Congress there is a determined effort to pass what is known as a Public Buildings Bill; that is a bill providing for the

¹ Callan vs. Wilson, 127 U. S. 555; Lawton vs. Steele, 152 U. S. 141; Schick vs. United States, 195 U. S. 65.

erection of Federal buildings in many different cities and towns. It is frequently successful.

By the Act of March 4, 1913, such provision was made for somewhere between 160 and 170 new structures. The Federal Government acquires exclusive criminal jurisdiction over all sites purchased for such purposes with the consent of the State legislature.

70. Whether a Crime is Committed Within State or Federal Jurisdiction is Sometimes a Difficult Question of Fact.—In a particular case it may be difficult to determine whether the State or the Federal Government has jurisdiction.

There is in the grounds of the State House at Annapolis a statue of the Baron de Kalb. It was erected by the United States. The State of Maryland¹ ceded to the United States as a site for it a plot of ground 24 feet square. It might not always be easy to say whether an offense was committed within or without the narrow confines of this piece of ground.

71. Whether a Crime is Committed Within the Exclusive Jurisdiction of the United States is Sometimes an Important Question.—That may be the very question which it is important to determine. For example: A group of men may be standing near the DeKalb statue. The pocket of one of them may be picked. The offender may be caught. He may be sentenced to fifteen years in the State penitentiary if the offense was committed outside of the 24 feet square. If within it the maximum penalty will be ten years.

Before January 1st, 1910, when the Federal Penal Code went into effect, one year's imprisonment was the severest punishment which could have been inflicted upon any one convicted of larceny within the exclusive jurisdiction of the United States.

Some years earlier, a famous professional criminal while in the Postoffice in Baltimore, stole the satchel of a runner

¹ Acts of 1884, Chapter 339.

of the Merchants National Bank. He was arrested, tried and convicted. He received the maximum penalty. That was only one year. Had he taken the same satchel on the west side of Calvert Street instead of on the east he might have been sent to the penitentiary for fifteen.

Other interesting questions of jurisdiction arise. For example: A number of years ago a somewhat intoxicated sailor from a United States war ship provoked a controversy with two residents of Annapolis. While he was scuffling with one of them the other shot him. He died in a few minutes. When the bullet struck him, he was on one of the grass plots forming part of the Postoffice site of Annapolis. The man who fired was at the moment outside of the lines of that lot on one of the public streets of the town and therefore within the jurisdiction of the State of Maryland. It is a principle of the common law that in such cases the offense is committed where it takes effect.¹ The man who fired the fatal shot was accordingly tried in the Circuit Court of the United States for the District of Maryland. If his trial had taken place in a State Court he doubtless would have been convicted of murder in the second degree. That was punishable by imprisonment in the penitentiary for from five to eighteen years.

Prior to 1897 any one convicted in the United States Courts of murder was punished with death. Between 1897 and 1910 the jury were allowed to return a verdict of guilty of murder, but without capital punishment. If they did the convict was sent to the penitentiary for life. In this Annapolis case the jury found a verdict of guilty of murder, without capital punishment. The prisoner was necessarily given a life sentence.

Since the Penal Code went into effect, a person indicted for murder may be found guilty in either the first or the second degree.² The penalty for the former is death unless the jury qualify their verdict by the addition of the words "without capital punishment." For the latter it can not be

¹ United States vs. Davis, 25 Fed. Cases, 786 (No. 14932).

² Section 273, 35 Stat. 1143.

less than ten years' imprisonment, it may be life-long confinement.³

72. Congress Has Made Some State Criminal Laws Applicable to Places Within Exclusive Federal Jurisdiction.—The character and the consequences of an Act should not ordinarily depend upon whether it was committed a foot or two on one side or the other of the boundary line of a lot upon which a Federal building stands. Many years ago Congress attempted to limit the occasions upon which anything of this kind can happen by providing that any one who commits in any place which has been ceded to or under the jurisdiction of the United States, an offense which is not prohibited, or the punishment for which is not specially provided for by any law of the United States, shall be liable to and receive the same punishment as the laws of the State in which such place is situated, at the time Congress acted. provided for the like offense when committed within the jurisdiction of such State. It was further declared that no subsequent repeal of any such State law should affect any prosecution for such offense in any Court of the United States. This Act is constitutional. Congress could in the very language used by the State legislature have enacted all or any such State laws. It can, if it wishes, do the same thing by adopting them all in general terms.

73. Congress May Not Adopt in Advance Such Laws as a State May Pass.—It was quite early ruled, however, that Congress could not make State laws to be subsequently passed, applicable to territory within the jurisdiction of the United States.¹ It cannot delegate its exclusive jurisdiction, or any part of it, to a State legislature. It follows that when, after the passage of a congressional Act adopting State legislation the State creates a new offense or increases or diminishes the punishment for an old one, its commission in a place within the exclusive jurisdiction of the United States will be

³ Sections 275, 330, 35 Stat. 1143, 1152.

¹ United States vs. Paul, 6 Peters, 139.

punished differently than it will be if committed on the other side of the boundary line of the Government's property. Congress, therefore, at short intervals re-enacts the Act and adopts all State legislation up to the time of its latest enactment.

The statute now in force is section 289 of the Penal Code.²

74. When Congress Has Exclusive Jurisdiction.—

The constitutional provision is that Congress shall have power to exercise exclusive jurisdiction in all cases whatsoever over all places purchased with the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings.¹

Whenever, for any of the purposes named, the legislature having consented, the property is bought, the United States *ipso facto* acquires exclusive jurisdiction over it. The reservation by the State of concurrent jurisdiction to serve civil and criminal process within lands so purchased does not limit or affect the exclusive right of the United States to punish crimes and offenses therein committed. Sometimes the State attaches to its consent to the purchase conditions which, if effective, restrict the jurisdiction of the United States and make it less than the Constitution says it shall have. What the effect of such attempted limitation by the State legislature is has not been clearly determined. Probably a consent so limited is no consent at all, and the land remains in the same situation it would have been, had it, without the consent of the State legislature, been purchased by the Government for the purpose in question.

The United States may acquire land without the consent of a legislature when such land is purchased for a proper governmental purpose. Over lands so obtained the Government has no other jurisdiction than that sufficient to prevent the State or anyone else from interfering with its use by the Government for Federal purposes. Over such of them

² Acts of 1909, Ch. 321, 35 Stat. 1145.

¹ Constitution, Art. 1, sec. 8.

as are acquired for purposes other than those specially named in the constitutional provision already referred to, the State may grant such extent of jurisdiction as to it may seem fit. The United States when admitting a State into the Union may maintain exclusive jurisdiction over land then owned by the United States.

A review of this whole subject will be found in the very interesting case of *Fort Leavenworth R. R. Co. vs. Lowe*.²

75. When Offenses Against State Laws Are Not Offenses Against Federal Laws, Although Committed Within the Exclusive Jurisdiction of the United States.

—In 1908, the *New York World* charged that Charles Taft, a brother of Judge Taft, at the time a candidate for the Presidency of the United States, and Douglas Robinson, a brother-in-law of President Roosevelt, had been improperly interested in the sale, by the French Panama Canal Company, of its property to the United States. By the law of the State of New York libel is an indictable offense.

The *New York World* is habitually sold within the limits of the West Point military reservation, which is in Orange County in the State of New York, and one or more copies are regularly mailed to the Postoffice Building in New York City; both places are within the Southern District of New York. It is printed in the defendant's printing establishment in the City of New York. The Grand Jury of the United States for the Southern District of New York indicted the publishers of the *World* for publishing the libel in a place within the exclusive jurisdiction of the United States. The case was taken to the Supreme Court. CHIEF JUSTICE WHITE pointed out that "where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling. Yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the

² 114 U. S. 525.

several States are left to be punished under the applicable State statutes.”

The law of New York which made libel punishable, provided that where a person libelled was a resident of the State, the prosecution should be either in the county of such residence or in the county where the paper was published, and where the person libelled was a non-resident the prosecution should be in the county in which the paper on its face purported to be published, or if it did not so indicate, in any county in which it was circulated, and that the accused could not be indicted or tried for a publication of the same libel against the same person in more than one county. To allow a prosecution in the United States Court for the circulation of that libel upon a Government reservation would have been using a State law for the prosecution of an offense in a manner forbidden by that law. The indictment should have been found by the State Grand Jury for the County of New York, where the paper was published. It was therefore held that the prosecution could not be sustained.¹

The judges of the Supreme Court were careful to say that they “do not intimate that the rule which in this case has controlled our decision would be applicable to a case where an indictment was found in a court of the United States for a crime which was wholly committed on a reservation, disconnected with acts committed within the jurisdiction of the State, and where the prosecution for such crime in the Courts of the United States instead of being in conflict with the applicable State law was in all respects in harmony therewith.”

Such a case as that upon which the Supreme Court declined to intimate their opinion would be raised if someone within a United States reservation published and circulated a libel, such reservation being either the sole, or the primary and most important place of publication.

¹ United States vs. Press Pub. Co., 219 U. S. 1.

76. Offenses on the High Seas.—The Constitution¹ empowers Congress to define and punish piracies and felonies on the high seas. The high seas are open waters without the body of a county and which are in fact free to the navigation of all nations and peoples. They do not include the waters surrounded by or enclosed between narrow headlands or promontories.² Within this definition are included the waters of the Great Lakes.³ Congress has exercised this power and has made punishable a number of offenses when committed on the high seas.

77. Offenses Upon Navigable Waters.—Much navigable water does not form a part of the high seas within the definition above given. There is no express grant to Congress of power to make offenses committed on such waters punishable, but the Constitution does declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. All waters which are in fact navigable either by themselves or in connection with other waters for purposes of interstate or foreign commerce, are within the admiralty jurisdiction.¹

Congress has always assumed that it has the power to provide for the punishment of offenses committed thereon. The Courts have held this assumption well founded.²

It has legislated with reference to such waters only so far as has been necessary to prevent serious inconvenience and scandal. It has provided for the punishment of offenses committed upon waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on

¹ Article 1, sec. 8, Cl. 10.

² *United States vs. Brailsford*, 5 Wheat. 184.

³ *United States vs. Rodgers*, 150 U. S. 255.

¹ *The Robert W. Parsons*, 191 U. S. 26.

² *Imbroke vs. Hamburg American Steam Packet Co.*, 190 Fed. 234.

board any vessel belonging in whole or in part to the United States, or to any citizen thereof, or to any corporation created by or under the laws of the United States or of any State, territory or district thereof,³ or when committed upon any vessel licensed, registered or enrolled under the laws of the United States and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting any of them, or upon the River St. Lawrence where it constitutes the international boundary line.⁴ It has also made punishable certain offenses when committed on board an American vessel although within the jurisdiction of a particular State, as, for example, assaults by the master upon the crew.⁵ It is under these statutes that the masters of vessels engaged in dredging oysters in Maryland waters have, in the United States District Court for the District of Maryland, been tried and convicted for beating and otherwise cruelly treating their dredgers.

78. Federal Criminal Procedure.—While the criminal procedure of the Federal and of the State Courts is very similar in most respects, there are differences both in form and in substance.

79. United States Commissioners.—There are no Federal Justices of the Peace. The original Judiciary Act authorized United States Judges and certain State officers to give preliminary hearings to persons accused of offenses against the United States and to admit them to bail or to commit them for trial.¹ It was speedily found that prisoners were sometimes taken into custody at places which were not within a convenient distance of any person empowered to take bail. In such cases the Circuit Courts were directed to appoint, for that purpose, one or more discreet persons learned in the law.² Various statutes from time to time added to the

³ Act March 4, 1909, sec. 272, 35 Stat. 1142.

⁴ Ibid.

⁵ Ibid, sec. 291, 35 Stat. 1145.

¹ Section 33, 1 Stat. 91.

² Act March 2, 1793, 1 Stat. 334.

powers and duties of these appointees. For a great many years they were known as Commissioners of the Circuit Courts. In 1896 their official title was changed to United States Commissioners;³ and it was provided that they were for the future to be appointed by the District and not by the Circuit Courts. Their term of office is now four years. They have always been removable at the will of the appointing power. The District Court may appoint as many of them as it sees fit. They receive no salary. They are compensated exclusively by fees. They have a number of miscellaneous powers and duties. Most of these are enumerated by the Supreme Court in the case of *United States vs. Allred*.⁴

80. Warrant of Arrest.—There are not many United States Commissioners. There are many places in the United States from which you would have to go a hundred miles or more before you could find one. Even near where one ordinarily resides there may be frequent occasions when he is not accessible at the moment when immediate action is necessary. The Federal law, therefore, provides that "for any crime or offense against the United States, the offender may, by any Justice or Judge of the United States," or by any United States Commissioner, "or by any Chancellor, Judge of a Supreme or Superior Court, Chief or first Judge of Common Pleas, Mayor of a city, Justice of the Peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as by law has cognizance of the offense."¹

In practice State Justices of the Peace are occasionally called on to issue warrants and hold the prisoner to bail or commit him for the action of the United States Court. As a rule, however, the preliminary hearings are had before a

³ Act May 28, 1896, 29 Stat. 184.

⁴ 155 U. S. 594.

¹ Rev. Stat., sec. 1014.

United States Commissioner. Sometimes, as under the State practice, proceedings are first instituted by an indictment or presentment by the Grand Jury.

81. Where Offender Must Be Tried.—The Sixth Amendment to the Constitution of the United States provides that the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District where the crime has been committed. It is not always easy to tell where that is. The offense may have been begun in one district and completed in another. In such case the Act of Congress provides that it may be prosecuted in either.¹ When committed out of the jurisdiction of any district, as on the high seas, or in some of the guano islands belonging to the United States, the statute provides that the trial shall be in the district in which the offender is found, or in the district into which he may be first brought.² It was under this provision that the Circuit Court for the District of Maryland some twenty-five years ago tried thirty or more negroes who, on the Island of Navassa, a barren guano rock in the West Indies, rose in mutiny and murdered a number of the white men in charge of the work there carried on.³

82. When an Offense Begun in One District Has Been Finished in Another.—In applying the statute which provides that when an offense has been begun in one district and has been completed in another the offender may be prosecuted in either, it is necessary to keep clearly in mind what is the precise offense charged. How important this may be is shown by comparison of section 5480 of the Revised Statutes, as it stood before section 215 of the Penal Code was substituted for it, with section 3894 of the Revised Statutes as amended by the Act of September 19, 1890.¹

¹ Rev. Stat., sec. 731.

² Rev. Stat., sec. 730, sec. 5576.

³ Jones vs. United States, 137 U. S. 202.

¹ 26 Stat. 465.

Section 5480 defined and punished what in ordinary parlance was referred to as the fraudulent use of the United States mails. In substance it provided that any person who had devised a scheme or artifice to defraud to be effected by means of the postoffice establishment of the United States and who should, for executing such scheme, place or cause to be placed any letter in the mails, or should take any letter therefrom, should be punished by fine or imprisonment.

On the other hand, section 3894 as amended provided, among other things, for the punishment of any person who should knowingly cause to be delivered by mail any lottery ticket.

In the first statute the offense was the putting into the mails or the taking out of the mails. This could be committed only in one district—that is the district in which the letter was put in the mail or the district in which it was taken out of the mail. It followed that all prosecutions for violations of section 5480 had necessarily to be brought at the place at which the offender had sent out his mail or at which he had received it. In such cases the accused might have sent letters into every State in the Union. There was ordinarily only one district in which he could be prosecuted.

The second statute mentioned makes it an offense knowingly to cause to be delivered a lottery ticket or a circular relating to a lottery.

One, Horner, in New York, deposited in the mail a lottery circular addressed to a person in the Southern District of Illinois. Such circular was in due course of mail delivered to the individual to whom it had been directed. The Supreme Court of the United States held that the offense was the causing to be delivered by the mails; that it was not completed until the delivery took place, and as that delivery was in the Southern District of Illinois the District Court of the United States for that district had jurisdiction.² To prevent misapprehension, it should be said that section 215 of the Penal Code, which has taken the place of old section 5480 of

² Horner vs. United States, 143 U. S. 207.

the Revised Statutes, now makes it an offense for anyone, for the purpose of executing a scheme or artifice to defraud, knowingly to cause to be delivered by mail any letter according to the direction thereon. Doubtless under the decision in *Horner vs. United States*, *supra*, one who now uses the mails in furtherance of a fraudulent scheme may be prosecuted in the district in which he mails the letter or in any district to which he sends it. In that case many businesslike offenders will be liable to indictment in half the judicial districts of the United States.

There thus may be a constructive, as distinguished from a personal, presence in a district. A man may cause a crime to be committed at a place in which he never was. If he does he may be prosecuted where the crime was so consummated.

The whole subject has been recently and fully reviewed by the Supreme Court of the United States.³

83. When Accused is Arrested in Another District.

—When a prosecution is instituted, it often happens that the accused is not in the district in which the offense is said to have been committed. In such case he may be arrested wherever he happens to be. He will be brought back to the district having jurisdiction of the offense upon a warrant of removal signed by the District Judge of the district in which he is found. This warrant is never issued until after the accused has had a hearing before a United States Commissioner or other committing magistrate, or has waived it.

84. Removal Proceedings After Indictment Found.—

If an indictment has been found against him in the district in which the offense is alleged to have been committed, the Government produces at the hearing a certified copy of the indictment and a witness or witnesses who can prove that the man under arrest is the man whom the Grand Jury intended to indict. As a rule, this is all that need be done.¹

³ *Hyde & Schneider vs. United States*, 225 U. S. 347.

¹ *Beavers vs. Haubert*, 198 U. S. 87.

An indictment if valid on its face raises a presumption of probable cause. The Supreme Court has said that

“the extent to which a Commissioner in extradition may inquire into the validity of the indictment put in evidence before him, as proof of probable cause of guilt, has never been definitely settled, although we have had frequent occasion to hold generally that technical objections should not be considered, and that the legal sufficiency of the indictment is only to be determined by the Court in which it is found. Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another district from that to which the extradition is sought, the Commissioner could not properly consider it as ground for removal. In such case resort must be had to other evidence of probable cause. * * * An Extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts or the indictment offered in support thereof contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case.”²

The indictment is, however, not conclusive evidence that there is probable cause to believe the accused guilty. He may rebut the presumption it raises. He may offer testimony to show that he did not do what was charged against him in the indictment. If he does, the testimony must be heard and considered.

The Grand Jury of the United States for the Middle District of Tennessee indicted a number of firms, corporations and individuals, for a violation of the Sherman Act. Some of the defendants were arrested in Virginia. They offered to produce testimony that in the Middle Dis-

² Benson vs. Henkel, 198 U. S. 10.

trict of Tennessee they had not and could not have committed the offense charged in the indictment. The offer was refused on the ground that in Virginia no examination before a committing magistrate can be had after the defendant has been indicted. The Supreme Court held that the refusal constituted reversible error.³

85. Removal Proceedings Before Indictment Found.

—Frequently the accused is arrested before it has been possible to obtain an indictment. In such case it is necessary to send to the district in which he is in custody witnesses who can show that there is probable cause to believe that he has committed the offense charged against him. He has precisely the same kind of hearing in that district as he would have had had he been arrested in the district in which the offense was committed.

86. Removal Hearings Usually Held by United State Commissioner.—Section 1014 of the Revised Statutes already quoted provides that the Commissioners and the other officers therein named may arrest and imprison or bail offenders for trial before such Court of the United States as by law has cognizance of the offense. In point of fact, these hearings, whether the accused has already been indicted or not, are usually held before a United States Commissioner. If he finds there is probable cause to believe the prisoner guilty he so certifies to the Judge of the district, who thereupon, and ordinarily without further hearing, issues a warrant of removal.

87. Duty of District Judge in Removal Proceedings.

—But “in such cases the Judge exercises something more than a mere ministerial function involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause and determine whether the Court

³ Tinsley vs. Treat, 205 U. S. 20.

to which the accused is sought to be removed, has jurisdiction of the same.”¹

“Doubtless the action of the committing magistrate is *prima facie* sufficient for the basis of the warrant, but it is not conclusive, and while the Judge should not necessarily require another or preliminary examination, if in his judgment it is expedient that the prisoner be further heard in defense, it is his duty to pass fully upon the case and determine for himself whether the removal should be ordered.”²

88. Proceedings May Be First Taken in District in Which Prisoner is Arrested.—Ordinarily the order of removal is not made until some criminal proceedings have been begun in the district in which it is alleged the offense has been committed, but it is not absolutely necessary that such proceeding shall have been so instituted. CHIEF JUSTICE MARSHALL, after a hearing in the Virginia District before him as committing magistrate, committed Aaron Burr for trial in Ohio for an offense alleged to have been there committed, although in the latter district up to that time no steps had been taken in the matter.

89. When Indictment Necessary Before Accused May Be Tried.—The charge upon which a person accused of crime is tried, is regularly embodied either in an indictment or in an information. The Constitution declares that no one shall be held to answer for a capital or other infamous crime except upon an indictment by a Grand Jury. “Infamous,” as applied to crimes, means, in different connections, different things. Thus, under the Constitution of Maryland, conviction of an adult for larceny or other infamous crime involves perpetual disfranchisement unless there is a pardon from the Governor. The taking of an apple or an ear of corn which does not belong to one is an infamous crime. The committing of an assault with intent to rape is not. Con-

¹ Tinsley vs. Treat, 205 U. S. 29.

² Price vs. McCarty, 89 Fed. 84.

viction for the former entails perpetual disfranchisement; for the latter no disfranchisement at all.¹

By a State statute such an assault may be punished by death or by long confinement in the penitentiary. Nevertheless, the Court of Appeals of Maryland has held that it is not even a felony.²

Here the State follows the classification of crimes which the common law made for the purpose of determining the competency of witnesses. It held those offenses infamous which were not likely to be committed by any one whose evidence could be safely relied on. The Supreme Court of the United States has said that the Fifth Amendment was intended for the protection of the accused. "Whether a man shall be put upon his trial for crime without a presentment or indictment by a Grand Jury of his fellow-citizens depends upon the consequences to himself if he shall be found guilty." By the law of England, informations by the Attorney-General without the intervention of a Grand Jury were not allowed for capital crimes nor for any felony; by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands or goods, or both. The question whether the prosecution must be by indictment or may be by information thus depended upon the consequences to the convict himself. "The Fifth Amendment * * * manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses." "The question is whether the crime is one for which the statutes authorize the Court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial except upon the accusation of a Grand Jury." The Court concludes: For more than a century imprisonment at hard labor in the State prison or penitentiary or other similar institution has

¹ State vs. Bixler, 62 Md. 360.

² Dutton vs. State, 123 Md. 373.

been considered an infamous punishment in England and America."³

90. All Offenses Against the United States Punishable by More Than One Year's Imprisonment Are Both Infamous Crimes and Felonies.—Whenever a convict is sentenced to imprisonment for more than one year he may be sent to a penitentiary.¹ It follows that where an offense may possibly be punished by more than one year's imprisonment it is an infamous crime. The person charged with it can be prosecuted by indictment only. All offenses against the United States punishable by death or imprisonment for more than one year are felonies.² All offenses for which no such punishment can be inflicted are misdemeanors. It follows that the line of demarcation between infamous and non-infamous crimes is now in the Federal practice the same as between felonies and misdemeanors. There are two possible exceptions to this rule. It may be that there are offenses punishable by not more than one year's imprisonment in which hard labor may be added as part of the penalty. If there are such it is probable that they are infamous crimes.

In *Ex parte Wilson*,³ the Supreme Court intimated that there may be crimes the commission of which would be in public opinion so disgraceful that they would be held "infamous" within the purpose of the Fifth Amendment, independent of the punishment which may be prescribed for them.

91. When Accused May Be Prosecuted Upon an Information.—As a rule, however, all offenses for which the offender upon conviction cannot lawfully be punished by an imprisonment exceeding one year, may be prosecuted upon information. An indictment is not necessary. An information is filed by the District Attorney under his official oath of office.

³ *Ex parte Wilson*, 114 U. S. 417.

¹ R. S., sec. 5541.

² Penal Code, sec. 335, 35 Stat. 1152.

³ 114 U. S. 417.

At common law, the King, through his Attorney-General, might file informations in certain classes of cases without any evidence and against all evidence.

The Fourth Amendment to the Constitution of the United States provides, among other things, that no warrants shall issue but upon probable cause supported by oath or affirmation. It follows that no warrant may issue upon an information filed by a United States District Attorney, except it be supported by a statement made under oath or affirmation by someone having actual knowledge as to facts which if true, show probable cause to believe the accused guilty.¹ If the latter is already in custody upon a warrant duly issued by a United States Commissioner upon a complaint in ordinary form, it is not necessary for the District Attorney to have new complaints or affidavits made. He may annex to his information the affidavits made to the complaint before the Commissioner or the evidence of the witnesses given at the preliminary hearing before the committing magistrate.²

Leave of Court is necessary before an information can be filed. This leave is usually granted, though it may be denied.³

92. Either Indictment or Information Necessary Before Accused Can Be Put Upon His Trial for Anything Other Than a Petty Offense.—No one can be tried, upon a criminal charge, unless he has been indicted by the Grand Jury or an information has been filed against him by the District Attorney. Prosecutions for what at common law were known as petty offenses are exceptions to this rule. In all other cases the prosecution may begin with a complaint to, and a warrant of arrest from, the committing magistrate. The accused is given a hearing before the latter. The indictment or information is a subsequent step in the proceedings. The Grand Jury may, however, itself investigate

¹ United States vs. Tureaud, 20 Fed. 621; Johnston vs. United States, 87 Fed. 187.

² United States vs. Baumert, 179 Fed. 739.

³ United States vs. Schurman, 177 Fed. 581.

the case before a warrant has been sworn out against anybody. The first paper filed before any legal tribunal may be the presentment. In like manner the District Attorney may without giving the accused a previous hearing, exhibit an information against him.

93. An Indicted Person Arrested in the District in Which the Indictment Has Been Found, Cannot Demand a Preliminary Hearing.—Mr. Hughes in his book on Federal Procedure¹ says “the preliminary examination is a valuable right, and the prisoner can have it either on prosecutions instituted by complaint or by indictment.” For this the case of *United States vs. Farrington*² is cited. An examination of the opinion in that case shows that the particular point was not involved. The Supreme Court appears to have definitely ruled that the absence of the preliminary examination is no ground for objection to the indictment.³ An earlier case⁴ on circuit was to the same effect.

94. Persons Accused of Anything More Serious Than Petty Offenses Cannot in Federal Courts Waive Jury Trials.—There is one marked distinction in the trial of criminal cases between the practice of the Federal and some of the State Courts. For example, in the Courts of Maryland a prisoner may in any case whatever elect to be tried by the Judge without a jury. In the United States Courts he may do so only when charged with the so-called petty offenses.¹ Among them are the violations of the navigation laws referred to in sections 4300 to 4304 of the Revised Statutes. These latter may be prosecuted without either indictment or information upon a written complaint verified by oath and presented to the Court. It is read to the accused. He may plead to or answer it or make a counter statement. The trial is then proceeded with

¹ 2nd Ed. 32, 33.

² 5 Fed. 343.

³ *Goldsby vs. United States*, 160 U. S. 73.

⁴ *United States vs. Fuers*, 25 Fed. Cases, No. 15174.

¹ *Thompson vs. Utah*, 170 U. S. 343.

in a summary manner before the Court. The accused may at the time of pleading or answering demand a jury trial. If he does a plea of not guilty is entered on his behalf, and a jury is impaneled. The complaint takes the place of an indictment or information. To detain the accused until a jury can be gotten together to try him may sometimes inflict upon him a greater punishment than is merited by the offense with which he is charged. At one time many Federal Judges doubted whether even under such circumstances a defendant could constitutionally waive a jury trial. Whenever it was possible a jury was impaneled even when the traverser was willing to go to trial without one.² I have in a few cases in this district, tried such cases without a jury. The doubt as to the constitutionality of such proceeding can no longer be entertained.

The case of *Shick vs. United States*³ was an action by the Government to recover a penalty of \$50 under section 11 of the Oleomargarine Act. The parties in writing waived a jury trial and agreed to submit the issues to the Court. This was something they had a clear statutory right to do if the proceeding was a civil one. The Supreme Court, however, held that the case was in its nature criminal, though it was one of the class known to the common law as petty offenses and did not necessarily involve any moral delinquency. It was not a crime within the meaning of the third clause of section 2 of Article 3 of the Constitution, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury. Consequently the defendant could lawfully and effectually waive his right to such a trial.

95. The Trial.—In what respects may the procedure in a criminal trial in a Federal differ from that in a State Court?

96. Accused May Be Tried at One Time for Several Crimes or Offenses of the Same Class.—In Maryland, as

² *In re Smith*, 13 Fed. 25; *United States vs. Smith*, 17 Fed. 510.

³ 195 U. S. 65.

in many other States, one accused of several offenses may ordinarily demand a separate trial upon each of them. He may do so even when the different charges are of the same general character and are in a sense at least all parts of one continuous transaction. Thus, a clerk in the employ of the City of Baltimore was said to have embezzled or stolen a very large sum from it. It was stated that, as usual in such cases, the money had been taken on many different occasions. The Grand Jury made each of these asserted takings the basis of a distinct indictment. He had several trials. At each of them he was called upon to answer a single charge only. The evidence for the State was confined with more or less strictness, to matters relevant to the alleged abstraction of the particular sum named in the indictment the jury was sworn to try. Had he been in the employ of the Federal Government and accused of stealing from it, the case would have taken a different course. In all probability the Federal Grand Jury would have combined all the accusations against him in a single indictment of many counts. Each of these counts would have charged the taking of a particular sum. It is possible that separate indictments would have been found against him as they were in the State Court. In either event he would in all likelihood have been tried on all the charges at the same time.

Section 1024 of the Revised Statutes provides, that whenever there are several charges against any person growing out of the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment and in separate counts. If two or more indictments are found the Court may order them to be consolidated.

The language is permissive, not mandatory. The question of whether indictments for offenses which may be joined shall be consolidated, is therefore left to the sound judicial discretion of the Court.

It is not easy to lay down any precise rule as to what offenses may be joined in one indictment or tried together upon the consolidation of separate indictments, or as to when the prosecutor will be compelled to elect between or among the counts of the indictment. Such election will be compelled at any stage of the trial when it becomes apparent to the Court that otherwise the prisoner may be embarrassed in his defense.¹

The accused demurs or pleads precisely as he does in the State Courts.

97. Challenge of Jurors.—Assuming that a plea of not guilty has been interposed, the next step is the selection of a jury.

State law or practice has nothing to do with the number of peremptory challenges allowed either the Government or the accused. That is fixed by Federal statute.¹ In trials for treason and capital felonies, the prisoner is entitled to twenty; for felonies not punishable by death to ten. In each of the above classes of cases the Government has six. In all other cases, civil and criminal, each party has three.

The parties on either side, no matter how numerous they may be, are for the purpose of challenging considered as one. Five defendants jointly tried will have no more peremptory challenges than if only one of them stood at the bar.

98. Laws of Evidence in Criminal Trials in Federal Courts.—After the jury has been selected and sworn and the opening statements made, the witnesses are examined. By what laws of evidence are the Federal Courts governed in the trial of criminal cases?

Since 1862 a Federal statute has provided that, with some exceptions not necessary to be here mentioned, the laws of the State in which the Court is held shall govern the competency of witnesses in the Courts of the United States, in trials at common law, in equity and admiralty. A criminal

¹ Pointer vs. United States, 151 U. S. 403.

¹ Section 287, Jud. Code.

case is in one sense a trial at common law. Nevertheless, this enactment has no application to criminal prosecutions.

99. State Statutes Cannot Control Rules of Evidence in Criminal Cases in Federal Courts.—Before its adoption two men were jointly indicted in the Circuit Court of the United States for the Eastern District of Virginia, for murder on the high seas. By permission of the Court they were tried separately. One of them called the other as a witness in his behalf. A statute of Virginia adopted in 1849 and in force at the time of the trial, provided that no person not jointly tried with the defendant should be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof. Congress had declared that the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, should be regarded as rules of decision in trials at common law in the Courts of the United States. The Supreme Court, speaking through CHIEF JUSTICE TANEY, said:—

“It could not be supposed * * * that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. * * * Neither could the Court look altogether to the rules of the English common law as it existed at the time of the settlement of this country. * * * Nor is there any Act of Congress prescribing in express words the rule by which the Courts of the United States are to be governed in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the Acts of 1789 and 1790, establishing the Courts of the United States and providing for the punishment of certain offenses. And the law by which, in the opinion of this Court, the admissibility of testimony in criminal cases must be determined is the law of the State as it was when the Courts of the United States were established by the Judiciary

Act of 1789. * * * But no law of a State made since 1789 can effect the mode of proceeding or the rules of evidence in criminal cases."¹

It was accordingly held that the testimony of the co-defendant was properly rejected.

In 1887 one Logan, in the United States Circuit Court for the Northern District of Texas, was put on his trial for conspiracy and for murder. The Act of 1862 had been for many years in force. It was then embodied in section 858 of the Revised Statutes. The Government offered as a witness a person who had been convicted of felony in a North Carolina State Court. He had never been pardoned. Against the objection of the defendant he was permitted to testify. Texas became an independent Republic in 1836. Its Congress adopted the common law of England as to evidence. It was admitted into the Union in 1845. Since 1858 its laws have declared that anyone convicted of felony within it or in any other jurisdiction should, unless pardoned, be incompetent to testify in criminal trials. The Supreme Court held that no one of the Acts then consolidated in section 858 of the Revised Statutes had changed the rules which in *Reid's Case* it had laid down as to evidence in criminal cases in the Federal Courts. The common law was in force in Texas when it was admitted into the Union. By that law a conviction in another State had no effect by way of penalty or of personal disability or disqualification beyond the limits of the State in which the judgment was rendered. It followed that the trial Court had not erred in allowing the witness to testify.²

100. Congress May Change Rules of Evidence in the Federal Courts.—Congress may at any time alter the rules of evidence governing trials in the Federal Courts. It has from time to time done so. It has made the accused a competent witness. His failure to take the stand does not create any presumption against him; and the prosecuting counsel may not comment upon it.

¹ *United States vs. Reid*, 12 How. 361.

² *Logan vs. United States*, 144 U. S. 298.

101. In Criminal Cases in Federal Courts Husbands or Wives Are Not Competent Witnesses for or Against Each Other.—In the Federal Courts the common law rule which, with certain carefully limited exceptions, rendered a husband incompetent to testify in a criminal case either for or against his wife, and the wife either for or against her husband, still remains in force.¹ Congress, it is true, has provided that in certain kinds of prosecutions, such as for bigamy, polygamy and unlawful cohabitation, the lawful husband or wife of the accused shall be a competent witness. In the State Courts of Maryland a husband or wife may testify for or against the other, but they will not be permitted to disclose confidential communications. In criminal trials in the United States Courts they are not, as a rule, permitted to testify at all.

102. No Person Disqualified as a Witness by Reason of Race, Color or Previous Condition of Servitude.—By statute all disqualifications on the ground of color, race or previous condition of servitude have been removed.

103. In Federal Criminal Cases Rules Governing Competency of Witnesses, Except When Changed by Congress, Same as in the State When Admitted to the Union.—With the exceptions above stated, the rules governing the competency of witnesses in criminal cases in the United States Courts sitting in any particular State are those rules which existed in that State in 1789, or at the subsequent date at which it was admitted to the Union. The only important difference between the rules as to the competency of witnesses in criminal cases applied in the Federal Courts and in the State Courts of Maryland is that, as already stated, in the Federal Courts in criminal cases husbands or wives are ordinarily incompetent to testify for or against the other.

¹ *Cohen vs. United States*, 214 Fed. 29.

104. Evidence Admissible in Cases of Disputed Handwriting.—The rules governing the admissibility of evidence in criminal trials in the Federal Courts and in the State Courts of Maryland are substantially the same. The one exception of importance to this general statement has been recently removed by Congress.

Formerly, in the Federal Courts, the genuineness of a disputed handwriting could not be determined by a comparison of it with other handwriting of the party, unless the paper admitted to be in his handwriting, or to have been physically subscribed by him, was in evidence for some other purpose in the cause. If it was, it might be compared by the jury with the disputed writing. This comparison could be made either with or without the aid of expert witnesses.¹

In Maryland, as in most of the States, this common law rule was years ago changed by statute. Section 7 of Article 35 of the Code of Public General Laws provides that comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses, and such writing and the evidence of witnesses respecting the same may be submitted to the Court and jury, or to the Court, as the case may be, as evidence of the genuineness of the writing in dispute.

The Act of Congress of February 26 1913,² declares that any admitted or proved handwriting of a person by whom the disputed writing is alleged to have been written shall be competent for comparison by witnesses, judge or jury.

105. All Who Take Part in Violating a Federal Law Are Principal Offenders.—All who participate in a violation of a Federal law are principals. Section 332 of the Penal Code provides that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, conceals, commands, induces or procures its commission, is a principal. The common law rule governing the participants in the commission of misdemeanors has,

¹ *Hickory vs United States*, 151 U. S. 305

² 37 Stat. 683.

therefore, been extended by Congress to all those who are in anywise concerned in the commission of a felony.

106. In Criminal Trials in the Federal Courts Juries Are Not Judges of the Law.—After the evidence is all in, it becomes necessary to determine what the applicable law is. In Maryland and in some other States, the jury in criminal cases are the judges both of the law and the facts. In the Federal Courts this is not so. In both civil and criminal cases the judge instructs the jury as to what the law is. It is his duty so to do. It is their duty to accept the law as he declares it to be. This duty is however, a moral one only. It may be that the facts in the case are practically undisputed. They may make out a clear case of guilt. The judge, however, cannot instruct the jury to find a verdict of guilty. He cannot set aside a verdict of not guilty if they return it. A person who has been once put in jeopardy cannot for the same offense be again tried, unless the first verdict is set aside at his instance.

In spite of the fact that a jury may ignore the instructions, the power to instruct is of great importance. In the overwhelming majority of cases juries accept the law as the Court declares it.

In *Sparf vs. United States*¹ JUSTICE HARLAN for the majority of the Court, and JUSTICE GRAY for the minority, brought a wealth of historical and legal learning to the discussion of the relation in criminal cases of the jury to the Court. The case will richly repay careful reading.

107. A Federal Judge May Comment Upon the Facts.—A Judge of the Federal Court may also review the facts of the case. He may make such a charge as an English judge may and does. The Federal judges habitually charge their juries even in criminal cases and in so charging review the facts more or less elaborately. They can comment on the evidence as they see fit provided they do not do so in an

¹ 156 U. S. 51.

intemperate or argumentative manner. They must, however, make it perfectly clear to the jury that although they are bound by what the Court says as to the law, they are under no obligation to take the Court's view of the facts. A judge may intimate or express his opinion as to the guilt or innocence of the prisoner provided he leaves no doubt upon the jury's mind that they are free to come to another conclusion if they are so disposed.

It has been decided in this circuit that the judge may not, after the jury have retired and have reported their inability to agree, tell them that in his opinion the prisoner is guilty. It has been thought by our Circuit Court of Appeals that an expression of opinion by the judge at such a time is likely to have an undue influence upon the action of the jury.¹

108. Excepting to Judge's Charge.—The prisoner may except to anything in the judge's charge which he regards as erroneous. In order that the exception shall avail him, it is necessary that his counsel at the time it is taken shall point out specifically what particular portion of the charge is alleged to be erroneous. The object of this rule is obvious. A judge may consume an hour in charging the jury. By a slip of the tongue he may say something or several things which are not good law. If the prisoner's counsel is free to put in a general exception to the entire charge, the judge will not have his attention called to those matters in which it was supposed he was wrong. If they were brought to his notice he would have had an opportunity before the jury retired to correct the mistakes he had inadvertently made.

109. The Jurisdiction of District Courts Over Suits for Federal Penalties, Forfeitures and Seizures.—As we have seen, the District Courts are given jurisdiction exclusive of the Courts of the States of all suits for penalties and forfeitures incurred under the laws of the United States and of

¹ Foster vs. United States, 188 Fed. 305.

all seizures under the laws of the United States on land or on waters not within the admiralty and maritime jurisdiction.

110. Suits for Penalties and Forfeitures and to Enforce Seizures Are Civil Proceedings.—There are a number of statutes of the United States which impose pecuniary penalties for various breaches of the Federal law and provide that such penalties may be enforced by suit; as, for example, the penalty for importing under contract an alien laborer;¹ and the penalties imposed upon a railroad for violating the Safety Appliance Act or the Hours of Service Act.² A suit to collect such a penalty is, when the liberty of the defendant is not imperiled, a civil proceeding. A verdict should be given upon a preponderance of evidence. The Court may instruct the jury to find for one party or the other. The defendant, if an individual cannot be compelled to testify against himself.³

The latter constitutional guarantee has no application to corporations. They may be forced to furnish evidence of their own guilt.⁴

Under the customs and revenue laws of the United States, under the Food and Drug Act and the Insecticide Act, and perhaps under other statutes, real or personal property may become liable to forfeiture to the United States. Such forfeiture is not incurred unless somebody has done something by law forbidden. It usually cannot be enforced unless somebody has committed a criminal act. Nevertheless, a suit for its enforcement is a civil proceeding. The judge may instruct a verdict. The jury may upon a preponderance of the evidence find in favor of the Government.⁵

¹ Hepner vs. United States, 213 U. S. 103.

² C. B. & Q. R. R. Co. vs. United States, 220 U. S. 559.

³ Hepner vs. United States (*supra*).

⁴ B. & O. R. R. Co. vs. Interstate Commerce Commission, 221 U. S. 612.

⁵ Grain Distillery No. 8 vs. United States, 204 Fed. 429; Lilienthal's Tobacco vs. United States, 97 U. S. 237; Four Packages vs. United States, 97 U. S. 404.

CHAPTER IV.

CIVIL CONTROVERSIES OVER WHICH THE
JURISDICTION OF THE DISTRICT
COURTS IS EXCLUSIVE OF
THAT OF THE STATES.

111. The District Courts Have Exclusive Jurisdiction in Admiralty.—No State Court may exercise jurisdiction in admiralty. Every case in which it is sought to use the distinctive processes of the admiralty for the vindication of a maritime right is within the admiralty jurisdiction and therefore may be brought in a District Court of the United States and not elsewhere.

What processes are peculiar to a Court of Admiralty and what rights are in their nature essentially maritime are inquiries which may be most profitably made in connection with the study of the admiralty law. Their discussion here would carry us too far afield. It should, however, be noted that the fact that a controversy may be cognizable in the admiralty does not necessarily mean that the parties to it may not properly carry it into a Court of Law of a State or, in some cases, of the United States. If they are content to seek only the relief which such other Court is competent to give, they may there try out the differences between them, despite the fact that such disputes have their origin in a maritime transaction.

Matters of prize are so peculiarly of admiralty jurisdiction that it is hard to conceive of any common law proceeding applicable to them. Exclusive jurisdiction over all such cases is expressly given to the Courts of the United States. The closely analogous proceedings taken to enforce seizures on land made by the authority of the laws of the United States, are in fact, a part of the penal or *quasi*-penal jurisdiction of the Federal Courts. Something has already been said about them. Jurisdiction over them is necessarily

vested exclusively in the Courts of the sovereign for the vindication of whose laws they are decreed.

112. The District Courts of the United States Have Exclusive Jurisdiction Over All Cases Arising Under the Patent and Copyright Laws.—The law of patents and of copyrights cannot be here discussed. A case does not arise under the patent or the copyright laws unless it is brought to assert a right given by them. The Courts of the United States do not have jurisdiction over a controversy merely because a patent or copyright may be incidentally involved in it.

113. The District Courts Have Exclusive Jurisdiction in Bankruptcy.—The jurisdiction of the District Courts to adjudge a debtor a bankrupt, to administer his estate in bankruptcy, and to grant or to refuse him a discharge from such of his debts as are dischargeable in bankruptcy, is exclusive of all other Courts. Moreover, whenever a Federal bankruptcy law is in force, the operation of all State insolvency laws is suspended, so far as concerns persons and transactions coming within the purview of the Bankruptcy Act. It is, however, true that certain rights created by the bankrupt law, as, for example, the right of the trustee in bankruptcy to vacate a preferential conveyance, may be enforced in State Courts. The consideration of the very important branch of the jurisdiction of the District Court forms a part of all treatises on the law of bankruptcy and may not with profit be here further considered.

114. Federal Courts and Judges Have Exclusive Jurisdiction to Release by Habeas Corpus Persons Held in Federal Custody.—The power of Federal Courts and judges to issue writs of *habeas corpus* and the procedure under such writs are considered in another chapter. It is sufficient here to point out that no State Court or judge has any power to discharge anyone from Federal custody.

The whole question was reviewed by CHIEF JUSTICE TANEY in an opinion of great interest and ability.¹ One Booth had been arrested under a warrant issued by a United States commissioner for a violation of the Fugitive Slave Law. He was charged with having assisted a negro slave to escape from the custody of a United States deputy marshal. He had been committed by a United States commissioner for the action of the United States District Court for the District of Wisconsin. He applied for a writ of *habeas corpus* to a State judge. The judge granted it and upon hearing released him. The Supreme Court of the State affirmed the action of the judge below. Subsequently he was indicted by the United States Grand Jury, again arrested by the Federal authorities, tried, convicted and sentenced to imprisonment. The State Court on *habeas corpus* a second time discharged him from the custody of the Federal authorities. The Supreme Court of the United States said:—

“We do not question the authority of State Court or Judge who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The Court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the Judge or Court, by a proper return, the authority by which he holds him in custody. * * * But after the return is made and the State Judge or Court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of

¹ Abelman vs. Booth, 21 How. 506.

the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or Court upon a *habeas corpus* issued under State authority. No State Judge or Court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the Court or Judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

115. The Original Jurisdiction of the District Courts Which is Exclusive of that of the States But Concurrent With That of the Supreme Court.—As already stated, section 233 of the Judicial Code gives the District Courts original jurisdiction over suits against consuls and vice-consuls, concurrent with that conferred by the Constitution upon the Supreme Court, but exclusive of that of the State Courts.

116. Suits Against Consuls and Vice-Consuls.—A suit against a consul or vice-consul cannot be safely brought elsewhere than in a Court of the United States. If sued in a

State Court the defendant may, at any time, in the course of the proceedings, raise the question of jurisdiction; and a new suit in a Federal Court may then be subject to the bar of the Statute of Limitations.

The privilege of being sued in the Courts of the United States and not in those of the States is not a personal one which may be waived by the defendant. It is an immunity of his government. He can not surrender it. A consul who has been sued in a State Court does not by going to trial therein on the merits waive a right to object to the jurisdiction. He may, in the Appellate Court, for the first time, set up his claim for exemption from suit in the State tribunals.¹

117. Where a Consul is a Defendant, District Court Has Jurisdiction Irrespective of Citizenship or Status of His Co-defendants.—As we shall see, when the jurisdiction of the District Court depends upon diverse citizenship, every party on one side must be competent to sue, in the United States Court, every party on the other. Such is not the rule where one of the defendants is a consul or vice-consul. Then the District Court has jurisdiction in spite of the fact that if he were not joined with his co-defendants they could not be there sued.¹

118. In Suits Against a Consul Amount in Controversy Immaterial.—Nor in such cases is the amount in controversy material. If the plaintiff claims that a consul owes him any sum, however small, any legal proceeding to coerce payment must be taken in a Court of the United States.

119. The Privilege is That of Foreign, Not American, Consuls.—Consuls and vice-consuls, as the words are used in the statute under consideration, mean the consular representatives of foreign governments. An American consul

¹ Davis vs. Packard, 7 Peters, 275; Bors vs. Preston, 111 U. S. 252.

¹ Froment vs. Duclos, 30 Fed. 385.

whose station is abroad is not exempt from suits in the State Courts of this country.¹

120. Federal Courts Have Exclusive Jurisdiction of Suits Against the United States.—Section 256 of the Judicial Code, which enumerates the cases in which jurisdiction, vested in the Courts of the United States, shall be exclusive of the Courts of the several States, does not mention suits against the United States. It was unnecessary to do so. The United States cannot be sued except by its own consent. It has consented to be sued under some circumstances, but only in its own Courts.

121. Jurisdiction of Court of Claims and of District Courts of Suits Upon Claims Against the United States.—The Judicial Code¹ confers jurisdiction upon the Court of Claims over claims (1) founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims, the party would, if the United States were suable, be entitled to redress in a Court of law, equity or admiralty; (2) of disbursing officers for relief from responsibility; (3) of patentees whose inventions have without their consent been used by the United States.

Where the claim is of the first class above mentioned, and does not exceed \$10,000, concurrent jurisdiction is conferred upon the District Court.²

122. Contractual Claims Against the Government, Jurisdiction Over Which is Withheld from the District Courts.—Neither the District Court nor the Court of Claims has any jurisdiction to hear and determine claims growing out of the late Civil War, known as “war claims,” nor may they reopen any claim which had been rejected or reported on adversely prior to the third day of March, 1887, by any Court, department or commission authorized to hear and

¹ *Milward vs. McSaul*, 17 Fed. Cases, 425 (No. 9624).

² Section 145.

² Judicial Code, Sec. 24, Par. 20.

determine the same, nor may they hear or determine any claims for pensions. The District Court has no jurisdiction of cases brought to recover fees, salary or compensation for official services of officers of the United States. Formerly the District Court might entertain the last named class of suits, but by an Act passed on the 27th of June, 1898, it was provided that in future they should be cognizable in the Court of Claims only. From the Government's standpoint it is unwise to submit such claims to the determination of a Court of which the claimants may be officers.

123. District Court Without Jurisdiction of Claims for the Collection of Which Other Machinery is Specially Provided.—There are statutes which provide ways in which, under certain circumstances, claims against the Government for internal revenue taxes or customs duties paid under protest, may be recovered—in some instances by suit against the collector of internal revenue or of customs, and in others by an appeal to the Board of General Appraisers, and from thence to the Customs Court.

Where by statute the Government has specifically provided a method of determining the validity of a claim and a way of collecting it, the claimant cannot seek redress in any other manner.¹ This doctrine has its limitations. They have been clearly set forth by the Supreme Court.²

124. How Suit May Be Brought in the District Court Upon a Claim Against the United States.—The Act which gave concurrent jurisdiction to the District Court with the Court of Claims of contractual demands against the Government, is usually referred to as the Tucker Act.¹ It requires the plaintiff to bring suit by petition under oath. He must cause a copy of it to be served upon the district attorney of the United States for the district wherein he sues.

¹ Nichols vs. United States, 7 Wall. 122.

² Dooley vs. United States, 182 U. S. 222.

¹ 24 Stat. 506.

He is required to send another copy by registered mail to the attorney general of the United States. He must make and file with the clerk of the Court an affidavit that such service has been made and such copy mailed.

125. District Court Must in Suits Upon Claims Against the United States File an Opinion as Well as Findings of Fact and Conclusions of Law.—In this class of cases the Court must file a written opinion. In it there must be specific findings of fact and distinct statements of all conclusions of law involved in the case. If the suit be in equity or admiralty, the Court is directed to proceed according to its ordinary rules.¹

126. Court Has Jurisdiction of All Claims by the Government Against the Claimant.—The District Court has jurisdiction of all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the United States against any claimant who in such Court sues the Government.¹

The right of set-off or counter claim given the United States by this statute is far broader than that which exists between private parties in any suit at law or in equity in the Courts of Maryland or of the United States within Maryland, and indeed is broader than any usually given by the set-off statutes of other States.

127. Suits Upon Claims Against the United States Are Tried Without a Jury.—All suits brought under the provisions of the paragraph¹ in question are tried by the Court without a jury.

The Government may not be sued without its own consent. If it consents to be sued at all it has the right to say in what way the trial shall be conducted. The claimant is deprived of no constitutional privilege when Congress says “we will

¹ Sec. 7, 24 Stat. 506.

¹ March 3, 1863, 12 Stat. 765.

¹ Judicial Code, sec. 24, par. 20.

let you sue the United States provided the case is tried without a jury, and we will not let you sue otherwise.”

At the time the seventh amendment was adopted he could not sue at all. He could not now sue if the statute were repealed. It is open to him to sue or not to sue as he sees fit. If he does sue he must do so in the manner and subject to the limitations prescribed by law.

So much is clear enough. How is it when the Government seeks an affirmative judgment against him? Its right to sue him is not the creature of statute. That right has always existed. If the demand for which it brought suit was legal rather than equitable it could not deprive him of his right to a jury trial. The Supreme Court answers, Congress, tells him in advance that if he avails himself of the privilege of suing the Government in the special Court organized for that purpose, he may be met with a set-off, counter claim or other demand of the United States upon which judgment may go against him without the intervention of a jury. If he makes use of the privilege thus granted, he must do so subject to the conditions annexed by the Government to its exercise.²

128. No Relief Other Than a Judgment for Money May Be Given Against the United States.—Certain petitioners sought to have the United States compelled specifically to perform contracts for the conveyance of timber lands. The Court below held that they were entitled to the relief prayed. The Supreme Court reversed the judgment and decided that Congress had not given the Courts power to decree any relief other than the payment of money.¹

129. Limitation as to Suits Against the United States. Suits against the United States must be brought within six years after the cause of action arose.

Married women and infants whose claims first accrued during coverture or minority, and idiots, lunatics, insane

² *McElrath vs. United States*, 102 U. S. 426.

¹ *United States vs. Jones*, 131 U. S. 1.

persons and persons beyond the seas at the time the claim accrued, may bring suit within three years after the disability has ceased. None of such disabilities operate cumulatively.

130. The United States Can Not Be Sued for a Tort.

—Congress did not intend to make the United States liable to suits for torts. Such torts can be committed only by officers, agents or employees of the United States. It is not willing to assume the responsibility for their actions. There are many reasons of public policy why it should not do so. Courts, in applying the statute, will give effect to the obvious intent of Congress. They will, therefore, look through the form of the pleadings to see what the actual origin of the claim is. If the claimant is attempting to hold the Government liable for a tort, he will fail, no matter how ingeniously his contentions may be stated.

Someone was hurt in a Government elevator in the post-office building in New York. He brought suit against the United States, alleging that the Government had contracted to carry him safely and had broken its contract. The Supreme Court said:—

“Nothing short of an Act of Congress can make the United States responsible for a personal injury done to a citizen by one of its employees who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required.” “Causing harm by negligence is a tort” * * * “A party may in some cases waive a tort; that is. he may forbear to sue in tort and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained.”¹

¹ Bigby vs. United States, 188 U. S. 400.

CHAPTER V.

OF WHAT CONTROVERSIES DISTRICT COURTS
HAVE JURISDICTION CONCURRENT
WITH STATE COURTS.

131. Jurisdiction of District Court Concurrent With That of Courts of the States.—In some classes of cases the plaintiff may at his election bring suit either in a District Court of the United States or in a State Court. In legal phrase the jurisdiction of the District Courts is as to such cases concurrent with the Courts of the several States. Many of the most important controversies which are brought before the Federal Courts might have been taken into the State tribunals had the parties so wished.

The first paragraph of section 24 of the Judicial Code enumerates the classes of controversies which most frequently arise and in which there is this concurrent jurisdiction. It says:—

“All suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and” (a) “arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or” (b) “is between citizens of different States, or” (c) “is between citizens of a State and foreign States, citizens or subjects.”

This section is modeled upon and is an amplification and in some respects an amendment of section 11 of the original Judiciary Act. That section has been many times amended, the more important of such amendments prior to the adoption of the Judicial Code having been made by the Act

of March 3, 1875;¹ by the Act of March 3, 1887,² and by the Act of August 13, 1888.³

132. Jurisdiction Over These Classes of Cases Formerly in Circuit Court.—It is only since the abolition of the Circuit Courts that the District Courts have had any jurisdiction over the more important classes of cases mentioned in the first paragraph of section 24. Formerly such suits, if instituted in the Federal Courts at all, had to be brought in the Circuit Courts.

133. Jurisdiction Under Section 24, Paragraph 1, Limited to Suits of a Civil Nature at Law or in Equity.—The first paragraph of section 24 limits the proceedings over which it gives jurisdiction to the District Courts to suits of a civil nature at common law or in equity. This same limitation couched in this precise language was made by section 11 of the original Judiciary Act and by every revision thereof. Everyone of these words has been judicially construed many times. It has been said that every line of the Statute of Frauds is worth a subsidy, by which, of course, is meant that before any line of that famous enactment received its final interpretation a sum equal to a subsidy had been spent in litigation over it. Very much the same may be said of each one of the phrases now under consideration. Each of them will be briefly discussed.

134. What is a Suit?—A beginning may be made with the word “suits.” What is a “suit” within the meaning of the first paragraph of section 24?

CHIEF JUSTICE MARSHALL said:—

“The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of justice by which an individual pursues that remedy”
* * * “which the law affords him. The modes of proceeding may be various, but if a right is litigated between

¹ 18 Stat. 470.

² 24 Stat. 552.

³ 25 Stat. 433.

parties in a Court of Justice the proceeding by which the decision of the Court is sought is a suit."¹

The definition is broad. It has been much relied on. It is as sound and as accurate today as it ever was. It is true, nevertheless, that there are legal controversies which everybody calls suits and yet which may not be taken into the Federal Courts. It may be that some of them are clearly proceedings in a Court of Justice. Individuals there pursue the remedy which the law gives them. Rights are therein litigated between parties, who seek to obtain the decision of the Court, yet the Federal tribunals may not pass upon them. It has been sometimes said that the Courts of the United States have no jurisdiction over them because they are not suits, as in this connection Congress intended to use the words. Some nice and finely drawn reasoning has been used, to distinguish them from similar proceedings which everybody admits to be suits in every sense of that word. Much legal ingenuity and acumen has been exhibited in discovering, if not in creating, these distinctions. One may still believe that their real or supposed existence is not the reason why the Federal Courts have no jurisdiction over such matters. The Supreme Court has always kept steadily before it the dual nature of our Government. It has always been careful to reduce to a minimum the opportunities for clashing between State and Federal sovereignty. It has believed, and has been right in believing, that Congress was anxious that there should be no unnecessary friction, albeit Congress might not always have used words of precision. It has therefore habitually construed the general language of statutes in such manner as to avoid or reduce the chance of collision, and has thereby given effect to what it felt was the real intention of the law-makers. It has accordingly held that when Congress made a general grant to the Federal tribunals of jurisdiction over all suits of a civil nature between certain classes of litigants, or in which certain issues were involved, it

¹ *Weston vs. The City Council of Charleston*, 2 Peters, 464.

intended to except some controversies which could not be carried on in the Federal Courts without seriously and unnecessarily embarrassing the management by the States of matters which were peculiarly within their province.

135. Federal Courts Have No Jurisdiction Over Probate Proceedings.—The authority to make wills is derived from the State. The requirement of probate is but a regulation to make a will effective.

“Jurisdiction as to wills and their probate as such is neither included in, nor excepted out of, the grant of judicial power to the Courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred and it cannot be exercised by them at all until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a Court of the United States may take cognizance by reason of the citizenship of the parties.”¹

It follows that matters* of pure probate in the strict sense of the word are not within the jurisdiction of the Courts of the United States.

Now, what are matters of pure probate? They include all proceedings which by the law of the State may be taken to determine the right to probate, at the time of application, or to settle any such question thereafter in an ancillary probate proceeding. The State law may provide for a form of notice on an application to probate a will and may authorize a contest before the admission of the writing to probate, or it may authorize a will to be proved in common form, that is without notice, and may allow a supplementary probate proceeding by which the probate in common form can be contested. All such proceedings are matters of probate purely. It follows that the trial in Maryland of issues sent from the Orphans' Court to a Court of law to determine whether the testator was of sound mind, whether the signature to his will was his signature, whether the execution of the will was procured by undue influence or fraud, are proceedings ancillary

¹ *Ellis vs. Davis*, 109 U. S. 485.

to probate. Over such controversies the Courts of the United States have no jurisdiction, even when there is a diversity of citizenship between the parties to them.²

136. Federal Courts May Have Jurisdiction of Suits Inter Partes Involving the Validity of a Will.—

The rule which prohibits Federal Courts from exercising what is essentially a probate jurisdiction extends no further than the reason for it. Where the "State law, statutory or customary, gives to the citizens of the State in an action or suit *inter partes* the right to question at law the probate of a will or to assail probate in a suit in equity, the Courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies."¹

Thus, when the State law gives one who wishes to assail the validity of a will, the right to institute in a State Court either at law or in equity, an independent suit not ancillary to the probate proceedings, he may exercise the like privilege in a Federal Court, provided there is the necessary diversity of citizenship and amount in controversy.

137. Federal Courts May Have Jurisdiction to Construe a Will.—Even where the executor is in possession of the estate and therefore the estate itself is in the custody of a Probate Court, a Federal Court of Equity, where the necessary diversity of citizenship exists, may entertain a bill to construe the will. Its decree passed in such suit will be binding upon the executor.¹

138. Federal Court May Have Jurisdiction of a Suit Against an Administrator or an Executor on a Debt Due by the Deceased.—It is well settled law that where the necessary diversity of citizenship and amount in controversy exists, a suit may be brought in the Federal Court

² Farrell vs. O'Brien, 199 U. S. 89.

¹ Farrell vs. O'Brien, 199 U. S. 89, 110; McDermott vs. Hannon, 203 Fed. 1015; Gaines vs. Fuentes, 92 U. S. 10.

¹ Waterman vs. Canal-Louisiana Bank Co., 215 U. S. 33.

against an executor or administrator upon a debt alleged to be due by the testator or intestate.¹ If the plaintiff recovers a judgment in such suit, the fact that he was a creditor of the decedent is conclusively established. The Probate Court must give that judgment full faith and credit. The plaintiff cannot, however, by virtue of a decree of the United States Court seize any part of the decedent's estate. He must file his judgment in the State Probate Court and therein assert his rights.²

139. Federal Courts Disclaim all Jurisdiction of Divorce or the Allowance of Alimony.—As early as *Barber vs. Barber*¹ the Supreme Court said:—

“We disclaim altogether any jurisdiction in the Courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.”

This statement has been several times reiterated.² In the *Burros Case*, the reason for this disclaimer was stated to be that, within the States of the Union, the whole subject of the domestic relations of husband and wife, and parent and child belong to the laws of the State and not to the laws of the United States.

It is not true that the United States Courts will not take jurisdiction over any case which requires them to pass on questions of law peculiarly within the control of the States. The latter regulate, as they will, titles to the lands within them. All questions of real property law are governed by them, yet that fact has never been considered as any reason why a Federal Court will not take jurisdiction of an ejectment case, where the parties to it are of diverse citizenship.

In none of the cases above cited was it strictly necessary to decide whether the Courts of the United States could take

¹ *Hess vs. Reynolds*, 113 U. S. 73.

² *Yonley vs. Lavender*, 21 Wall. 276.

¹ *Barber vs. Barber*, 21 How. 582.

² *In re Burros*, 136 U. S. 586; *Simms vs. Simms*, 175 U. S. 167.

jurisdiction of a suit for a divorce and alimony where the parties to the controversy were citizens of different States and the alimony claimed was large enough. Under the Statutes of the United States as they now are and always have been, a suit for divorce only can not be maintained in the Federal Courts, because the question in controversy can not be reduced to a pecuniary standpoint. It is, however, clearly established that the Courts of the United States will not under any circumstances take jurisdiction of a suit for a divorce or for alimony as incident to a divorce proceeding.

While the controversy is *inter partes*, it also partakes largely of the nature of a proceeding *in rem* by which the future status of the married pair is to be determined. It is in the latter aspect analogous to a probate proceeding.

There are cogent reasons of public policy why Federal Courts should not interfere in such matters—reasons which have no application to land titles and the like, although the latter are, of course, subject to State regulation and control.

140. Courts of the United States May Have Jurisdiction of Suits to Recover Arrears of Alimony.—Where a State Court of competent jurisdiction has decreed that the husband shall pay the wife alimony, and he fails to comply with that decree, and the parties are citizens of different States, and the amount due by him is sufficient to give jurisdiction to the Federal Court, such Court may entertain an action by the wife to compel its payment.¹

141. District Courts May Take Jurisdiction of Condemnation Suits Under State Laws.—Federal Courts are sometimes asked to try condemnation cases where there is a diversity of citizenship between the parties and the necessary amount is in controversy. In gainsaying their right so to do, it has been argued that the proceeding to take private property for public use is an exercise by the State of

¹ Barber vs. Barber, 21 How. 582.

its sovereign right of eminent domain, with which the United States, a separate sovereignty, has no right to interfere.

To this reasoning the Supreme Court answered:—

“This position is undoubtedly a sound one so far as the act of appropriating the property is concerned. The right of eminent domain, that is the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. * * * When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an Act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the Courts between parties, the owners of the land on the one side and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.”¹

Ordinarily such proceedings are in their inception in the nature of an inquest to ascertain the value of the land, and they are not then a suit in the ordinary sense of that word. Usually at some stage they may, at the instance of either party, be transferred to a Court of law and may under the laws of the State take the form of a suit. They then become a matter of which the Federal Courts may assume jurisdiction, if the other necessary conditions exist.

The question as to whether these special proceedings are or are not suits, comes up most frequently in connection with the removal of cases from the State to the Federal Courts. The word “suit,” however, is used in the same sense in those

¹ *Boom Co. vs. Patterson*, 98 U. S. 406.

sections of the statute which confer original jurisdiction and in those which authorize removals.

142. Federal Courts May Not Under Section 24, Paragraph 1, of the Judicial Code, Entertain an Original Petition for a Mandamus.—It has always been held that a mandamus proceeding is not included within the suits of a civil nature at common law of which the Federal Courts, by section 11 of the original Judiciary Act and its various revisions, were given jurisdiction. There are two reasons for so holding. At common law mandamus was a prerogative writ. A private suitor had no right to ask for it. It was applied for by the Attorney-General. He might, if he saw fit, make such request at the instance of some individual and in reliance upon the latter's relation of the facts. The approved form of petition for the writ in many jurisdictions is "the State upon the relation of John Doe." In modern times, even where the old forms of pleading are more or less completely retained, a mandamus proceeding has become an ordinary suit which anyone may institute. A hundred years ago it still had more of its ancient seeming, even if most of its antique substance had passed away. There was, therefore, a real question in the minds of lawyers as to whether Congress intended to include mandamus proceedings within the word "suits" as used in the eleventh section. It was held that such was not the intention, because a comparison of the language of section 14 of the same Act, now section 716 of the Revised Statutes, led to that conclusion. That section reads: "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their .. respective jurisdiction and agreeable to the principles and usages of law." It was held that the writ of mandamus was included within the writs thus described, and that the obvious purpose of the section was to give to the Courts power to issue

them as ancillary to the exercise of some jurisdiction specifically conferred upon them.¹

There was doubtless a practical reason of public policy for reaching that conclusion—a reason which probably explains why the Courts have always adhered to the determination they first reached and why Congress has never authorized the Federal Courts, except in some specially enumerated cases, to entertain petitions for mandamus otherwise than in aid of their other jurisdiction.

Under our dual system of government, there are many opportunities for collisions between State and Federal authorities. It is not to the public interests that private litigants should be in a position to force them. If a citizen of one State conceived that he had the right to the exercise, by some public official of another State, of some purely ministerial function, he might go into the Federal Courts and apply for a writ of mandamus to compel that State official to do his duty. In the long run it is probably better that he be forced to seek relief of this kind from a State tribunal. Doubtless State prejudice or partiality sometimes stands in the way of his getting what he should have. If it does, it is a lesser evil than to arouse the antagonisms always so easily stirred up, when a Federal Court undertakes to direct a State officer to discharge some official duty.

Occasionally, where the writ of mandamus is used as a writ of execution, the Federal Courts have issued it to municipal officials. In this way judgments recovered against cities and counties have been enforced. The tax-levying officials of the defendant municipality have been commanded to levy a tax sufficient to pay the judgment.²

Congress has in a few special cases conferred upon the District Courts power to issue the writ as an original one—as, for example, to compel interstate carriers to furnish equal facilities to shippers.³

¹ *Rosenbaum vs. Bauer*, 120 U. S. 453.

² *Riggs vs. Johnson County*, 6 Wall. 166.

³ Sec. 10, Act March 2, 1889, 25 Stat. 862; *United States vs. Norfolk & Western R. R. Co.*, 143 Fed. 266.

143. What Does "Of a Civil Nature" Mean?—By the first paragraph of section 24 of the Judicial Code, the District Courts are given jurisdiction over such suits only as are "of a civil nature." The constitutional provision defining the extent of the Federal judicial power nowhere uses the word "civil" or any word of like import. Nevertheless, as was pointed out in *Chisholm vs. Georgia*,¹ and as CHIEF JUSTICE MARSHALL demonstrated in his opinion in *Cohens vs. Virginia*,² it is clear that, under the dual system established by the Constitution, the original jurisdiction of the Federal Courts is necessarily limited to cases of a civil nature, except when they are called on to enforce the laws of Congress. Any other construction would have extended Federal jurisdiction to criminal prosecutions against persons not citizens of the prosecuting State.

All the authorities bearing upon this question are fully reviewed in *Wisconsin vs. The Pelican Insurance Co.*³ The defendant, a Louisiana corporation, had carried on business in Wisconsin, and had there subjected itself to certain pecuniary penalties, for which the State in its own Courts recovered judgment for \$15,000. The company had no assets within the State. Wisconsin brought as an original action in the Supreme Court of the United States, a civil suit upon the judgment. The Court said it would look through the form to the substance. The claim was in essence for a penalty. It showed that it had repeatedly held that even its original jurisdiction was confined to proceedings of a civil nature.

144. In What Sense Does Paragraph 1, Section 24, Use the Words "At Common Law"?—What construction is to be put upon the words "at common law" as used in the paragraph now under consideration?

A suit may be a suit at common law without necessarily being a suit which could have been carried to a successful

¹ 2 Dallas, 419.

² 6 Wheat, 264.

³ 127 U. S. 265.

conclusion in one of the Superior Courts at Westminster. The jurisdiction is not restricted to old and settled forms. The words are used in contradistinction to proceedings in equity, on one hand, and admiralty and criminal cases, on the other. It includes all suits in which legal, as distinguished from equitable, rights are to be ascertained and determined. "Wherever by either the common law or the statute law of a State a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any Court which has jurisdiction of such matters and can obtain jurisdiction of the parties."¹

145. Suits Under Lord Campbell's Act Are Suits "At Common Law".—The Federal Courts, where the proper diversity of citizenship exists, can take jurisdiction of suits under the Lord Campbell's Acts of the States, although at common law no such suit could have been maintained. When the liability has been fixed by the law of one State, a Court of the United States sitting in another may enforce it;¹ it is not penal.²

146. In What Sense Does Paragraph 1, Section 24, Use the Phrase "In Equity"?—The jurisdiction applies not only to suits at common law, but also to suits in equity. What is meant by those words here? A case in equity is a case over which at the time of the adoption of the Federal Constitution the High Court of Chancery in England would have had jurisdiction in accordance with the principles and practices then recognized and followed by it.¹

147. State Legislation Cannot Limit the Equitable Jurisdiction of Federal Courts.—This jurisdiction cannot be diminished by any legislation of the States.

¹ Dennick vs. Railroad Co., 103 U. S. 11.

² Dennick vs. The R. R. Co., 103 U. S. 17.

² Texas & Pacific Railway Co. vs. Cox, 145 U. S. 604.

¹ Payne vs. Hook, 7 Wall. 425.

Wood & Lee were a firm, each of the partners of which was a citizen of the State of Missouri. They obtained a judgment in the State Courts of Louisiana against one Cohn, a citizen of the latter commonwealth. They filed their bill in equity in the Circuit Court of the United States for the Western District of Louisiana against Cohn, his wife and his wife's mother, all citizens of Louisiana. The bill sought to set aside as fraudulent a judgment in favor of Mrs. Cohn against Cohn; and asked that property standing in the name of Mrs. Cohn's mother and alleged to be in fact the property of Cohn, should be subject to the payment of the firm's judgments. The Court below dismissed the bill on the ground that equity had no jurisdiction, there being a well-known and adequate remedy at law. The Supreme Court said:—

“We are unable to concur in these views. It is well settled that the jurisdiction of the Federal Courts, sitting as Courts of Equity, is neither enlarged nor diminished by State legislation. Though by it, all differences in forms of actions be abolished, though all remedies be administered in a single action at law, and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal Court, sitting as a Court of Equity, remains unchanged.” * * * “That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its Courts by the Constitution and Acts of Congress in execution thereof. Without the assent of Congress, that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own Courts.” * * * “So conceding it to be true as stated by the learned Judge, that the full relief sought in this suit could be obtained in the State Courts in an action at law, it does not follow that the Federal Court, sitting as a Court of Equity, is without jurisdiction. The inquiry rather is whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a Court of law or one which only a Court of Equity was fully competent to give.”¹

¹ *Mississippi Mills vs. Cohn*, 150 U. S. 202.

Further stating the facts in the case, the Court said:—

“It will be seen from this statement that these bills were substantially creditors’ bills to subject property—in fact the property of the defendant, but fraudulently standing in the name of a third party—to the payment of those judgments, and to remove a fraudulent judgment which might stand as a cloud upon the title of the debtor. Such suits have always been recognized as within the jurisdiction of equity.”

The above case showed that no State legislation can diminish the equity jurisdiction of the Federal Courts.

148. State Legislation Cannot Extend the Equitable Jurisdiction of the Federal Courts Over Legal Demands.

—The converse proposition that no State legislation can extend that jurisdiction to matters essentially legal has been quite as clearly ruled.

149. A Federal Court of Equity May Not Set Aside a Conveyance in Fraud of Creditors at Suit of a Creditor Who Has Not a Lien.—The State of Mississippi has a statute substantially like that which forms section 46 of Article 16 of the Code of Public General Laws of Maryland, and which provides that in case of a proceeding in equity to vacate any conveyance or contract or other act as fraudulent against creditors, it shall not be necessary for any creditor to have obtained a judgment at law on his demand in order to be entitled to the relief sought.

Certain citizens of Missouri, Alabama and Louisiana claiming to be creditors of Cates & Co., citizens of Mississippi, filed a bill against the latter in the District Court of the United States for the Northern District of the last named State. The bill said the defendants had assigned their property with the fraudulent intent to hinder, delay and defraud the complainants and other creditors. The Supreme Court held that the United States Courts, as Courts of equity, had no jurisdiction. “The Constitution of the United States, in creating and defining the judicial power of the general government,” “established the distinction between law and equity.” “Equit-

able relief in aid of demands, cognizable in the Courts of the United States only on their law side, could not be sought in the same action, although allowable in the State Courts by virtue of State legislation." "The Code of Mississippi in giving to a simple contract creditor a right to seek in equity in advance of any judgment or legal proceedings upon his contract the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity to be heard and disposed of without a trial by jury, could not be enforced in the Courts of the United States because in conflict with the provision of the Seventh Amendment by which the right to a trial by jury is secured."¹

150. In Federal Courts Right of Trial by Jury Must Be Held Inviolable in What Were Cases at Common Law.

—That amendment declares that in suits at common law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved. In the Federal Court this right may, it is true, be waived by the parties entitled to it, but it is otherwise absolute and cannot be impaired or evaded by blending with a claim, properly cognizable at law, a demand for equitable relief in aid of the legal action or during its pendency. "Such aid in the Federal Courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact. * * * All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal Courts only on their law side."¹

Important practical consequences follow. Suppose a citizen of New York has a claim for \$3500 against a Maryland debtor. The creditor is satisfied he can show that the debtor

¹ Cates vs. Allen, 149 U. S. 451.

¹ Scott vs. Neely, 140 U. S. 106

has made a fraudulent transfer of property. He wants very much to attack at once the *bona fides* of the conveyance. It is important to keep the person in whose name or in whose possession the property is from transferring it for value to some innocent third party. The creditor needs an injunction without delay. Perhaps the Maryland man has large local influence. The New Yorker may at the time be personally unpopular in the particular county in which the defendant resides. He has in that event a more or less unpleasant choice to make. He will have to take the chance of local prejudices influencing the State Court against him or else he will have to lose the time necessarily consumed in first securing in the Federal Courts a judgment at law.

151. Federal Courts May Enforce in Equity New Rights Given by State Legislation When Such Rights Are Essentially Equitable.—Although no State legislation can take from a Federal Court the right to give equitable relief when, under the circumstances, equitable relief would have been given by the High Court of Chancery in 1789, and while no State legislation can authorize a Federal Court of Equity to dispose of a controversy which, in 1789, would have been one of common law cognizance, yet it is not true that State legislation cannot, in anywise, extend the jurisdiction of Federal Courts of Chancery. Those Courts have jurisdiction in cases where a new remedy in equity, is given by the State statutes in cases of the same general character as those of which the High Court of Chancery took jurisdiction, provided that they are not cases in which the defendant at common law would have been entitled to a jury trial.

Put in another way—no State legislation can change the boundary line between the legal and equitable jurisdiction of the Federal Courts, but it may on either side of that boundary extend the area of that jurisdiction. Where there has been a legal wrong without, at common law, a corresponding legal remedy, State legislation may supply one, and the Federal Courts will enforce it. Similarly State legislation

may provide an equitable remedy for an equitable wrong, although the High Court of Chancery in 1789 would not or could not have furnished relief. When that remedy has been given, a Federal Court, under proper circumstances, may apply it.¹

152. The Effect of the New Equity Rules Upon the Distinction Between Cases at Common Law and in Equity.—In the recently promulgated equity rules the Supreme Court has done much to diminish the injurious results of mistakingly taking a legal controversy into a Federal Court of Chancery. It is provided that if at any time in the course of the prosecution of a suit in equity it appears that it should have been brought as an action on the law side of the Court, it shall be forthwith transferred to that side to be there prosecuted, with only such alterations in the pleadings as shall be essential.¹

¹ Louisville & Nashville R. R. Co. vs. Western Union Tele. Co., 234 U. S. 211.

¹ Equity Rule, 22.

CHAPTER VI.

THE AMOUNT IN CONTROVERSY.

153. A Minimum Amount in Controversy.—We may now pass to the consideration of another condition which may be necessary to give jurisdiction to a District Court of the United States over a suit of a civil nature at common law or in equity—that is to say that there shall be a certain minimum sum in controversy.

154. Where United States or One of its Officers Sues, Amount in Controversy Immaterial.—When suit is brought by the United States or by one of its officers authorized by law to sue, the amount in controversy is immaterial. The United States ought not to be compelled to go into any other Court than its own to assert a right belonging to it, merely because the sum or value in controversy may be small.¹

The same reason applies when a suit is brought by an officer of the United States acting in his official capacity.²

155. When Controversy is Between Citizens of the Same State Claiming Lands Under Grants of Different States Amount in Controversy is Immaterial.—To provide impartial tribunals for the determination of disputes growing out of the grant of the same land by different States was one of the reasons for the adoption of the Constitution. Both New York and New Hampshire had claims to Vermont. What is now the last named State was preceding the revolutionary period, familiarly known in New England as the New Hampshire grants. The Green Mountain Boys first became famous by their irregular resistance to the asserted rights of New York. There had been

¹ Postmaster General vs. Early, 12 Wheat. 136.

² Henry vs. Sowles, 28 Fed. 481.

actual blood shed as the result of the grants made by Connecticut in what is now, and was then claimed to be, Northern Pennsylvania. The tribunals of either of the States concerned were ill fitted to deal with such disputes. Fortunately, litigation of this particular sort is now practically obsolete. If any case shall arise, it may be brought in a Federal Court irrespective of the pecuniary value of the land in controversy.

156. District Courts Have No Jurisdiction in Other Cases Mentioned in Paragraph 1, Section 24, Judicial Code, Unless Upwards of \$3,000 is in Controversy.—

None of the other suits mentioned in the first paragraph of section 24 can, under the authority given by it, be brought in a District Court of the United States unless the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000. This statement requires some explanation. Among the suits mentioned in this paragraph are those arising under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority. There are twenty-four other paragraphs in the section. Each of them gives the District Court jurisdiction of one or more descriptions of cases, all of which arise under the Constitution, laws or treaties of the United States. Most of them are suits of a civil nature either at common law or in equity. It is expressly provided that the requirement as to a minimum sum or value in controversy shall not apply to any of the proceedings referred to in those other twenty-four paragraphs. Accordingly, therefore, it should be said that upwards of \$3,000 in controversy is required to give the District Court jurisdiction of a case arising under the Constitution, laws or treaties of the United States, unless it is a case included in the grants of jurisdiction made by paragraphs 2 to 25, inclusive, of section 24, or is one over which jurisdiction is given by some other Act of Congress.

Where an amount in controversy is required, no suit, the purpose of which cannot be expressed in terms of pecuniary value, can be brought. For example: Suppose there is a question as to the custody of a child between those who had

been husband and wife, but who have been divorced? They may be citizens of different States. The United States Courts have no jurisdiction to issue a writ of *habeas corpus* to determine the right to the possession of the child.¹

157. Changes in the Amount Required to be in Controversy.—Congress has always been unwilling to permit suits for small sums to be brought into its own Courts, not because it specially wanted to save those Courts labor, or even because it was consciously jealous to uphold their dignity, but principally, if not solely, for the protection of litigants. Where the amounts at issue are not large, litigation in the Federal Courts may be unduly burdensome.

By the first Judiciary Act none of the suits which are now under consideration could be brought into the Federal Courts unless there was upwards of \$500 in controversy. In spite of the great increase in wealth in the country, this figure remained unchanged for nearly a century. By the Act of March 3, 1887, it was quadrupled, being fixed at upwards of \$2,000. It was again raised by the Judicial Code on January 1, 1912, to upwards of \$3,000. The amounts named were to be exclusive of interest and costs.

158. In Determining Amount in Controversy, Interest is Excluded Only When it is Claimed as Accessory to a Principal Demand.—The statute declares that the amount in controversy must be upwards of \$3,000, exclusive of interest and costs. This language does not mean that under no circumstances shall interest be taken into account in determining whether the required amount is in controversy. Conceivably the only thing in dispute may be interest. A may have lent B \$100,000 for five years at six per cent interest, payable annually. A year's interest may be in arrears. The contract may not have contained any provision by which failure to pay the interest when due made the principal immediately demandable. Under such circumstances A's only

¹ Barry vs. Mercien, 5 How. 103; Kurtz vs. Moffitt, 115 U. S. 487.

remedy would be to sue B for the amount of the over-due interest, viz. \$6,000. If there was the necessary diversity of citizenship, the case might be brought in the United States Court, although the only thing sued for would be interest. It would be itself the principal demand and not accessory to something else, the recovery of which was sought.

This principle has been applied to suits upon interest coupons. These coupons are each independent contracts. Suit to recover upon them is not in any just sense accessory to any other demand, but is in itself principal and primary.

When upwards of \$2,000, exclusive of interest and costs, was the amount required to be in controversy, suit was brought upon two bonds^{*} for \$1,000 each and upon overdue interest coupons attached to such bonds. The Supreme Court held that the amount in controversy exceeded \$2,000, exclusive of interest and costs.¹

The same principle had shortly before been applied to another kind of case. The defendant had, a number of years prior to the suit, sold the plaintiff a tract of Nebraska land for \$1,200. He gave a general warranty deed. Subsequently the plaintiff was ousted by third parties whose title was paramount to either that of plaintiff or defendant. Plaintiff then brought suit to recover upwards of \$2,000 from the defendant for breach of warranty. The State statute fixed the amount of recovery in such action at the price paid for the land with interest thereon until suit brought. The Supreme Court, in an opinion by JUSTICE WHITE, held that the sum demanded was not the price and the interest thereon as such, but damages for the breach of the covenant of warranty. It was, in the view of the Supreme Court immaterial that one element of such damage was interest. The suit was none the less a demand for what was in law a legal unit, viz, damages suffered by the plaintiff. The interest formed part of the principal demand and was not a mere accessory thereto.²

¹ Edwards vs. Bates County, 163 U. S. 269.

² Brown vs. Webster, 156 U. S. 329.

159. An Attorney's Fee Provided for in the Contract is Part of Sum in Controversy and not of the Costs.

—A debtor often promises to pay an attorney's fee if he does not discharge the debt when due. The amount of such fee, if fixed by the debtor's promise or when it is not, the sum alleged by the plaintiff to be reasonable, is included in the amount in controversy, and is not part of the costs.¹

160. Difficulty of Precisely Valuing the Right or Thing in Controversy Does not Necessarily Defeat Jurisdiction.—The pecuniary value of particular rights is often difficult of ascertainment. It may be that there are no certain standards for measuring their worth in money; it does not follow that they are valueless even in terms of dollars and cents.

When the minimum sum required was upwards of \$2,000, the Supreme Court ruled that the Circuit Court had jurisdiction over an action brought by a voter to recover \$2,500 from the election officials who wrongfully, as he alleged, rejected his vote for a representative in the Congress of the United States. The Court said:—

“What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the Court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court.”¹

161. In Suits for Unliquidated Damages the Amount in Controversy is Ordinarily the Sum Claimed by Plaintiff.—The last case cited is an illustration of the rule that, in actions for unliquidated damages, the sum in controversy is ordinarily the amount claimed by the plaintiff. It is not that which he ultimately recovers.

The whole subject was carefully considered by the Supreme Court of the United States a number of years ago.¹

¹ Springstead vs. Crawfordsville State Bank, 231 U. S. 541.

¹ Wiley vs. Sinkler, 179 U. S. 65.

¹ Barry vs. Edmunds, 116 U. S. 550.

The plaintiff Barry was a citizen of Virginia. In the year 1884 a tax of \$56.34 had been properly levied upon his property. The State of Virginia then had outstanding a great many coupon bonds. When they were issued the State had agreed that the coupons should be receivable in payment of all taxes. A majority of its people came to the conclusion that it was not able to pay these bonds in full. A long contest between the State and the bondholders ensued. Various laws were passed intended to make it difficult for a bondholder to use his coupons in payment of taxes. The plaintiff had tendered coupons for the tax assessed against him. The defendant had refused to receive them, and, in spite of a decision of the Supreme Court that they must be so received, had levied upon the property of the plaintiff and carried it away. The plaintiff asserted that the defendant's purpose in so doing was to make an example of him and to injure his credit. The Supreme Court said:—

“The cause of action stated in the declaration is a willful and malicious trespass in seizing and taking personal property, with circumstances of aggravation and averments of special damage.” * * * “The plaintiff is not limited in his recovery to the mere value of the property taken. That would not necessarily cover his actual, direct and immediate pecuniary loss. In addition, according to the settled law of this Court, he might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasion.”¹

162. Even in a Suit for Unliquidated Damages, Plaintiff's Claim Not Necessarily Conclusive of the Amount in Controversy.—This rule has its limits. There was a period when the State of South Carolina saw fit to monopolize the retail liquor trade within its borders. The State established certain dispensaries. No one other than the State's officers in charge of these institutions was lawfully entitled to sell liquors. Much litigation arose. A plaintiff

¹ Barry vs. Edmunds, 116 U. S. 550.

had shipped some packages of wines and brandies into the State. They were seized by some of the defendants for an alleged violation of its laws. Another of the defendants subsequent to the seizure, and with knowledge of its wrongful nature, received the packages into his custody, and refused to return them when demanded. The declaration alleged that the malicious trespass of the defendants and their continuation in the wrongful detention of the liquors had greatly damaged the plaintiff's business. It was further alleged that the goods had been seized wrongfully, knowingly, wilfully and maliciously, with intent to oppress, humiliate and intimidate the plaintiff, and make him afraid to rely upon the Constitution and laws of the United States. Judgment was prayed for the value of the goods, which was said to be \$1,000, and for \$10,000 damages. The Supreme Court said that this was nothing more than an action of trover; that in South Carolina the measure of damage in that kind of action is the value of the property converted; consequential damages are not recoverable. The amount claimed by the plaintiff, omitting the consequential damages, was, therefore, less than the sum necessary to give the Circuit Court jurisdiction.¹

163. In an Action *Ex Contractu* for Liquidated Damages the Amount in Controversy is the Liquidated Sum.

—In an action *ex contractu* upon a liquidated claim, the Court has no jurisdiction unless such liquidated sum exceeds \$3,000. It makes no difference what damage the plaintiff may demand if his declaration shows that the amount in controversy cannot exceed a sum which is below that required to give the Court jurisdiction.

At a time when the statute authorized the Circuit Court to take jurisdiction of controversies in which the amount involved exceeded \$500, and when it limited the right of appeal to the Supreme Court of the United States, to cases in which \$2,000 was involved, there was an action in which the writ

¹ Vance vs. Vandercook, 170 U. S. 468.

and the original declaration showed that the amount in controversy did not exceed \$1,000. The evidence offered at the trial by the plaintiff proved that it did not exceed \$700. The plaintiff at the close of his declaration claimed \$2,100 damages. It was held that the amount in controversy was \$1,000.¹

164. The Amount Recovered Does Not Determine Jurisdiction.—It was so ruled because where the amount in controversy, as it has been defined, is sufficient to give the Court jurisdiction, it is immaterial on the jurisdictional question that the trial may show that the defendant does not owe the plaintiff so much. The amount in controversy is that which the plaintiff seeks to make the defendant pay; not the amount which the judgment says he must pay.

In another one of the dispensary cases from South Carolina suit was brought for a malicious trespass. The declaration averred such facts as, if true, would have justified the jury in awarding punitive damages. The Supreme Court held that the Circuit Court had jurisdiction, in spite of the fact that the plaintiff recovered only \$300.¹

165. Jurisdiction May Exist Although Plaintiff's Declaration Shows That There May Be a Defense to His Claim.—The mere fact that the plaintiff's declaration on its face shows that there may be a defense, and even a perfect defense, to so large a part of his claim as will leave the balance below the jurisdictional amount, is not sufficient to oust the jurisdiction.

Thus, in the Circuit Court of the United States for the District of Nebraska, a citizen of Ohio, to whom a Nebraska corporation was indebted in the sum of \$2,100, only \$500 of which was due at the time the action was instituted, brought suit and applied for an attachment on the ground that the debtor was conveying his property with intent to defraud his creditors. It was objected that there being but

¹ Lee vs. Watson, 1 Wall. 337.

¹ Scott vs. Donald, 165 U. S. 58.

\$500 due, the amount in controversy did not exceed \$2,000. A Nebraska statute provided that where a debtor had made a fraudulent conveyance, a creditor might bring an action on a claim before it became due and have an attachment against the debtor's property. The Supreme Court said:—

“The fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the Court?”¹

The Court was careful to add:—

“We do not mean that a claim, evidently fictitious and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction.” * * * “It may be laid down as a general proposition that no mere pretense as to the amount in dispute will avail to create jurisdiction. But here there was no pretense. The plaintiff, in evident good faith and relying upon the express language of a statute, asserted a right to recover over \$2,000.”

166. If Plaintiff Recovers Less Than \$500 He Cannot Be Given Costs and May Have to Pay Them.—

Congress has discouraged the bringing in the Federal Courts of suits in which it is not likely that any considerable recovery can be had, by providing in section 968 of the Revised Statutes, that when a plaintiff or petitioner in equity, other than the United States, recovers less than the sum or value of \$500, exclusive of costs, he shall not be allowed, but at the discretion of the Court may be adjudged, to pay costs.

167. What is the Amount in Controversy When an Injunction Is Sought?—Where the suit is in equity and the relief prayed is an injunction, the amount in controversy is ordinarily the value of the right or thing which the complainant seeks to have enjoined. It is not the damage suffered by the complainant. Thus, a part owner of three steam-

¹ Schunk vs. Moline, Milburn & Stoddard Co., 147 U. S. 505; Smithers vs. Smith, 204 U. S. 642.

boats and commander of one of them, engaged in the navigation of the Mississippi River between St. Louis and St. Paul, filed his bill of complaint alleging that navigation was much injured and delayed by a bridge of the defendant, which he said was a permanent nuisance. His bill prayed for no damages, but only for an abatement of the nuisance. The Supreme Court said:—

“The want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy and the value of that object must govern.”¹

168. Distinct Claims Against Different Parties Cannot Be United to Give Jurisdiction.—Separate demands against different parties on distinct causes of action or on a single cause of action in which there are distinct liabilities, cannot be joined to give the Court jurisdiction.

A Vermont agent for four different insurance companies, by a single policy, insured the property of the plaintiff for \$12,000, each company severally assuming one-fourth of the obligation. Loss having occurred, the plaintiff brought a single suit against the four defendants and recovered a judgment for \$3,000 and interest against each one of them. The defendants wanted to take the case to the Supreme Court of the United States, which then had jurisdiction to entertain appeals in such cases where the amount in controversy exceeded \$5,000. It was held that the liability of each defendant was distinct, and as it did not exceed \$3,000, without interest, the Supreme Court had no jurisdiction.¹

169. Claims of Different Plaintiffs Against a Common Defendant Cannot Ordinarily Be United to Give Jurisdiction.—Several plaintiffs, each having claims less than the jurisdictional amount, cannot unite together in one joint suit so as to bring the amount in controversy up to the required sum.

Two judgment creditors of the same defendant each had a

¹ Mississippi & Missouri R. R. Co. vs. Ward, 2 Black, 492.

¹ *Ex parte* Phoenix Insurance Co., 117 U. S. 369.

claim less than the jurisdictional amount. The sum of the two exceeded that amount. They filed a bill in the United States Court to subject a particular fund, itself greater than the jurisdictional amount, to the liens of their respective judgments. It was held that the Court had no jurisdiction.¹

170. When Plaintiffs Must Join, the Amount in Controversy is the Aggregate of Their Claims.—This whole subject was carefully considered by the Supreme Court in *Gibson vs. Shufeldt*.¹ In another case it said:—

“The general principle * * * is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving” * * * “jurisdiction.”²

One of the tests as to whether a creditor's claim is a distinct one, or whether all the creditors stand together, is whether the suit as brought by the creditor is a suit which he could bring for himself individually, or whether it is a suit which he can only bring for himself and all other creditors.³

On this principle, in a number of cases, jurisdiction has been sustained of a creditor's bill, filed by a number of creditors whose claims aggregate more than the jurisdictional amount, though none of them by itself equalled that sum. When jurisdiction has been taken of such bills, they have been filed on behalf of the complainants and of all other creditors who might come in and contribute to the expenses of the suit. The bills were such as could not have been filed by an individual creditor on his own behalf.

¹ *Seaver vs. Bigelows*, 5 Wall. 208.

² 122 U. S. 28.

³ *Clay vs. Field*, 138 U. S. 479.

⁴ *Hanley vs. Stutz*, 137 U. S. 366.

CHAPTER VII.

CASES ARISING UNDER THE CONSTITUTION,
TREATIES OR LAWS OF THE UNITED STATES.

171. Only Certain Classes of Suits May Be Brought in Federal Courts Under Paragraph 1, Section 24, Judicial Code.—The analysis heretofore made of the very important first paragraph of section 24 of the Judicial Code has shown what a suit is; what kind of suits are of a civil nature; when a suit is at common law and when in equity, and what are the principles which determine whether the amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$3,000.

It also appeared that when the United States or one of its officers authorized to sue is the plaintiff, or when the litigation is between citizens of the same State claiming lands under grants from different States, the amount in controversy is immaterial. But even though a suit be of a civil nature at common law or in equity, and the amount in controversy exceed \$3,000, yet this paragraph does not give the District Courts jurisdiction over it unless it (a) arises under the Constitution, treaties or laws of the United States, or (b) is between parties of diverse citizenship. For brevity the former class are customarily referred to as cases which raise a Federal question.

172. Cases Raising a Federal Question—History.—The paragraph provides that the District Court shall have original jurisdiction of all suits of a civil nature at common law or in equity, when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000. and arises under the Constitution or laws of the United States or treaties made or which shall be made under their authority. No similar provision is to be found in the original Judiciary Act. It first made its appearance in the amend-

ment of 1875. Prior to that time such suits, unless the parties were of diverse citizenship or unless the controversy itself was one of a special class, jurisdiction over which had been conferred upon the Circuit Courts had to be brought before a State tribunal.

173. What Cases Raise a Federal Question?—The Supreme Court has said that “when it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction,” the case is one arising under the Constitution or laws of the United States within the meaning of that term as used in the Act of 1875, otherwise not.¹

174. Existence of Federal Question Must Appear From Plaintiff's Statement of His Own Case.—Where the only ground of jurisdiction is the existence of the Federal question, that there is such question must appear from the plaintiff's statement of his own case, in his declaration or bill. There may be many cases in which a plaintiff so setting up his claim does not state, and cannot state, that it arises under any Federal law. The case may actually turn upon a Federal question. In the end that may be the only thing decided, yet under the authorities it may not be a case arising under the Constitution or laws of the United State in such sense that the District Court will have jurisdiction over it.

For example—a defendant gives his promissory note to the plaintiff and does not pay it. When the plaintiff demands payment the defendant asserts that the note was given in furtherance of a combination to restrain interstate trade or to monopolize that trade in violation of the Sherman Anti-Trust Act. He frankly tells the plaintiff he will not pay it and that he will, on the ground stated, defend any suit brought against him. The plaintiff cannot bring such a case

¹ *Starin vs. New York*, 115 U. S. 248.

in the Federal Courts on the ground that a Federal question is involved. His statement of his own cause of action will show nothing more than that the defendant is indebted to him on the promissory note and has not paid him. No possible question under the Constitution, laws or treaties of the United States is raised.

175. Plaintiff Cannot Show Existence of Federal Question by Alleging What Defenses Will Be.—The plaintiff cannot give jurisdiction by alleging that the defendant sets up, or will set up, by way of defense, rights or pretensions which turn upon a Federal question. The Supreme Court says “where diversity of citizenship does not exist, a suit can only be maintained in the Circuit Court of the United States on the ground that it arises under the Constitution or laws of the United States, and it does not so arise unless it really and substantially involves a controversy as to the effect or construction of the Constitution or some law or treaty of the United States on the determination whereof the result depends. This must appear from plaintiff’s statement of his own claim, and cannot be aided by allegations as to defenses which may be interposed.”¹

The construction of the statement is for the Courts. If they do not see that it raises a Federal question the fact that the defendant thinks that such question is raised is immaterial.²

176. Court Has Jurisdiction if Plaintiff in Good Faith Sets Up a Federal Question.—If there is a Federal question actually in the case, that is to say, if the plaintiff in good faith sets up one as the basis of his claim, then the Federal Court has jurisdiction. It is immaterial that other questions are also involved.¹ It makes no difference that in the end the case is determined upon some other issue; precisely

¹ Devine vs. Los Angeles, 202 U. S. 313.

² N. J. Central R. Co. vs. Mills, 113 U. S. 257.

¹ R. R. Co. vs. Mississippi, 102 U. S. 135.

as it makes no difference that the judgment or decree may be for less than the jurisdictional amount.²

177. Whoever in a State Court Unsuccessfully Relies Upon the Constitution, Treaties or Laws of the United States, May Carry the Question to the Supreme Court.—A plaintiff cannot give jurisdiction to a Federal Court by anticipating in his complaint the raising by the defendant of a Federal question. He can, however, usually secure an ultimate ruling upon it by a Court of the United States. After the case has been fought through to the highest State Court having jurisdiction of it, and the Federal question has been there decided adversely to his contention, he can carry the controversy to the Supreme Court by writ of error. With such proceedings we are not now concerned. We are considering the original jurisdiction of the District Court and that alone. The books are full of cases in which the existence of the Federal question is one of the matters of dispute.¹ It will profit little to discuss their details. Sometimes a question so clearly arises under some Federal law or under some provision of the Constitution as to make it impossible seriously to question the jurisdiction of the Federal Court. Unless that be so, before assuming that a case raises a Federal question, it will be expedient to consider carefully the authorities and their bearing on its particular facts.

178. Federal Court May Have Jurisdiction Whether the Case Arises Under the Constitution, the Laws or the Treaties of the United States.—The clause of the first paragraph of section 24 of the Judicial Code now under consideration includes cases arising under

- (a) The Constitution of the United States.
- (b) A law of the United States.
- (c) A treaty of the United States.

² City Railway Co. vs. Citizens R. R. Co., 166 U. S. 562.

¹ City Railway Co. vs. Citizens R. R. Co., 166 U. S. 562.

In *Cohens vs. Virginia*, CHIEF JUSTICE MARSHALL declared that a case arises under the Constitution or a law of the United States whenever its correct decision depends on the construction of either.¹ The same test will determine whether it arises under a treaty.

179. Cases Arising Under the Constitution.—One individual may, through official position or otherwise, be so placed that he can prevent another from exercising some constitutional right. The injured party may, if the amount in controversy is sufficient, sue the wrongdoer, in the District Court of the United States, on the ground that the case arises under the Constitution. For example, the right to vote for a member of the House of Representatives of the United States is one given by the Constitution. It is true that the Constitution, in giving the right, confines it to those persons who are qualified, by the laws of the State in which they live, to vote for the members of the most numerous branch of its legislature; nevertheless, the right to vote for a member of Congress is a right derived from the Constitution. An election officer who improperly prevents a person so entitled to vote from casting his ballot may be sued in the District Court of the United States.¹

Perhaps the most numerous class of cases which are said to arise under the Constitution are those in which the plaintiff claims that the obligation of a valid contract with him is being impaired, or that he is being deprived of his life, liberty or property without due process of law, or is being denied the equal protection of the laws. The prohibition against such impairment or deprivation is directed solely at State action. It has no reference to what individuals may do, and, in order to show that a case of this class arises under the Constitution of the United States the plaintiff must allege that the defendant is acting under color of some State law. Such is the case where a railroad company sets up that some legislative Act or some proceeding of a

¹ 6 Wheaton, 379.

¹ *Wiley vs. Sinkler*, 179 U. S. 61.

public service commission acting under authority of such an act, is depriving it of its property without due compensation, by requiring it to perform public service at a rate so unremunerative as to cause practical confiscation.² The District Court has jurisdiction where a public service corporation complains that a municipality, acting under the authority of State legislation, is taking steps which impair the obligation of a contract validly entered into with it at some previous time.³

It will serve no good purpose to give further illustrations of this particular class of questions. The one distinction already mentioned must be kept steadily in mind; viz, that where one seeks redress for the breach of some prohibition which the Constitution imposes upon the States, he must show that the act of which he complains is being done under color of State law, but where he is being deprived of some positive privilege or immunity conferred upon him by the Constitution, it is immaterial whether the State is or is not involved.

180. Cases Arising Under a Law of the United States.—There are many cases which arise under some act of Congress. Thus, any suit which seeks to assert a right given by the Interstate Commerce Act, is clearly one arising under the laws of the United States.¹

The liability of the stockholders of a national bank, which has gone into liquidation, to the creditors of the bank is one which is created by the laws of the United States; a suit by a creditor to enforce such liability is therefore a suit arising under them.

181. Suits Upon Official Bonds of Officers of the United States or Upon Bonds Taken in the Course of Judicial Proceedings in the United States Courts.—In a series of cases, the United States Supreme Court has held

² Willcox vs. Consolidated Gas Co., 212 U. S. 19.

³ Vicksburg vs. Vicksburg Water Works Co., 202 U. S. 453.

¹ Macon Grocery Co. vs. Atlantic Coast Line R. R. Co., 215 U. S. 501.

² Wyman vs. Wallace, 201 U. S. 230.

that suits by private individuals upon the official bonds of United States marshals or clerks of Courts are cases arising under the laws of the United States.¹

It is clear that the Federal Courts have jurisdiction of suits brought upon *supersedeas*, injunction or attachment bonds taken in proceedings before them.²

182. Suits Against United States Officers for Acts Done Under Color of Their Office.—When a United States officer is sued for something which he did under color of his official duties, the case is one which arises under the laws of the United States. Thus, when suit is brought against a United States Marshal for seizing goods under an execution from a United States Court, the case so arises,¹ at least, if the declaration shows upon its face that when the defendant did that for which he is sued he was acting or claiming to act in his official capacity.²

183. Whenever a Federal Corporation is a Party the Case Arises Under the Laws of the United States.—Whenever a corporation created by Federal law is a party to an action, the case arises under a law of the United States. It was so ruled many years ago¹ and is still the unquestioned law.

184. Statutory Exception of National Banks.—Congress has declared that national banks shall, for purposes of actions by or against them, be held to be citizens of the States in which they are respectively located. Suits by or against a national bank cannot be brought in the Federal Courts unless they could have been brought by or against it had it been a corporation incorporated under the laws of the State in which it is located.¹

¹ Howard vs. United States, 184 U. S. 676.

² Lamb vs. Ewing, 54 Fed. 269; Leslie vs. Brown, 90 Fed. 171.

¹ Bock vs. Perkins, 139 U. S. 628.

² Sonnentheil vs. Moerlein Brewing Co., 172 U. S. 404.

¹ Osborn vs. United States Bank, 9 Wheat. 738.

¹ Judicial Code, sec. 24, par. 16.

It should be borne in mind, however, that this legislation does not apply to receivers of such banks. They may, because they are officers of the United States, sue in the Federal Courts irrespective of the amount in controversy. In the Circuit Court for the Western District of Pennsylvania a receiver of a national bank brought suit for about \$60.²

185. Cases Arising Under a Treaty of the United States.—To give jurisdiction to the Courts of the United States on the ground that the case is one arising under a treaty of the United States, plaintiff's right, as stated by him, must depend upon the construction or application of some provision of the treaty. There have been a few instances in which it has been asserted that such a case existed. In scarcely any of them have the Courts held that it did. Thus, for illustration, a plaintiff claimed that he had succeeded to the rights of one who had obtained a valid grant of land from the Spanish Governor of Louisiana and that by the treaty with France by which Louisiana was ceded to the United States, the latter bound itself to respect the grants theretofore made by the Spanish or French Governments, and that the defendants were in wrongful possession of the land and would not surrender it. The Supreme Court said that there was involved no question as to the construction of the treaty or its application. The only question in the case even remotely connected with the treaty was one of fact as to whether the plaintiff's ancestor had ever received a grant which under the laws and regulations of the province of Louisiana was valid when it was made. Such inquiry raised no question under the treaty.¹

186. Cases involving a Federal Question and Not Dependent Upon the Amount in Controversy.—There are twenty-four paragraphs of section 24 devoted to an enumeration of cases arising under the Constitution, laws or treaties of the United States or in which the national or

² *Murray vs. Chambers*, 151 Fed. 142.

¹ *Muse vs. Arlington Hotel Co.*, 168 U. S. 430.

official character of some of the parties involved brings the controversy within the constitutional grant of judicial power to the United States. In none of these does the jurisdiction of the District Court in anywise depend upon the amount in controversy. It will not be necessary here to say a great deal about any of them.

187. Subjects Already Discussed.—The criminal, penal and quasi-penal jurisdiction of the District Court as conferred by paragraphs 2, 3 and 9 has already been sufficiently discussed, as has the power to hear and determine claims against the United States given by paragraph 20, and the right, exclusive of the State Courts and concurrent with the Supreme Court, to take cognizance of suits against consuls and vice-consuls granted by paragraph 18.

188. Subjects Not to Be Here Discussed.—The admiralty, patent, copyright, trade-mark and bankruptcy jurisdiction as conferred by paragraphs 3, 7 and 19 can be most profitably studied in connection with the substantive law of those topics.

189. Cases Under the Revenue and Postal Laws.—Two of the paragraphs of this section, viz, 5 and 6, give jurisdiction over cases arising under the internal revenue, the customs and the postal laws. Closely related to these is the grant of jurisdiction contained in paragraph 10 over suits by assignees of debentures for draw-backs of duty against previous holders of such debentures.

By section 80 of the Act to Regulate the Collection of Duties on Imports and Tonnage,¹ it was provided that an importer of dutiable goods might under regulations therein prescribed receive a debenture for the amount of draw-back to which he might become entitled upon the re-export of such goods. Such debentures were often used by the holder for the purpose of raising money. If any question arose upon

¹ March 2, 1799, 1 Stat. 687.

such assignment, it was desirable that the case should be tried in the United States Court. I do not find reference by any of the annotators of the statutes to a decision under this grant of jurisdiction. It is probably, therefore, of small practical importance.

190. Cases Concerning Government Interest in Land.

—The 21st and 25th paragraphs are intended to give to the United States Courts jurisdiction of some cases in which the United States is concerned as a landlord. The 21st paragraph refers to suits to restrain the unlawful enclosure of public lands. As the United States will in all such cases be the complainant, the special grant of jurisdiction would be unnecessary except that the paragraph also provides that service of process may be had upon any agent or employee having charge or control of the enclosure. The 25th paragraph gives the District Court jurisdiction of any suit brought by a co-tenant of the United States for a partition of lands held in joint tenancy or tenancy in common, and grants a like privilege to the United States. Such suit must be brought in the district in which the land lies.

191. Jurisdiction for the Protection of Aliens and Indians.—The 17th paragraph gives jurisdiction of a suit by an alien for a tort in violation of the law of nations or of a treaty of the United States, and the 24th of all actions, suits or proceedings involving the right of anyone with Indian blood to an allotment of land under law or treaty.

192. Jurisdiction for the Protection of the Privilege and Immunities of Citizens of the United States.—Paragraphs 11, 12, 13, 14 and 15 give the District Courts power to take cognizance of suits authorized by Federal law to protect or vindicate the rights and privileges of citizens of the United States. Only one portion of these statutes antedate the Civil War, and that is the part of paragraph 11, which authorizes the District Court to take jurisdiction of

suits brought by any person to recover damages for any injury to his person or property on account of an act done by him under law of the United States for the protection or collection of its revenues. This is substantially the provision in section 2 of the famous Force Bill, passed in view of the threatened nullification by South Carolina of the tariff of 1828.¹ It was a part of Gen. Jackson's answer to that State.

The other provisions all originated subsequently to the Civil War. They are intended more effectually to secure the rights guaranteed by the 13th, 14th and 15th amendments. The 15th section gives jurisdiction over suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity, secured by the Constitution of the United States, or of any right secured by any of its laws providing for equal rights of its citizens, or of all persons within its jurisdiction. It was under this provision that suits were brought by some colored citizens of Anne Arundel County residing in Annapolis against registers of voters of that city who, acting under the terms of a State law, had refused them registration. JUDGE MORRIS upheld the jurisdiction of the Court and awarded damages to the plaintiffs.²

193. Jurisdiction for Enforcing Rights Under the Laws Regulating Commerce, the Immigration of Aliens and Protecting Trade and Commerce Against Restraints and Monopolies.—Paragraph 8 confers upon the District Court jurisdiction over all suits and proceedings arising under any law regulating commerce. Under this head are included suits brought for deaths or personal injuries under the Employer's Liability Act of April 22, 1908.

¹ Act March 2, 1833.

² Anderson vs. Myers, 182 Fed. 223.

Section 22 confers like jurisdiction of suits or proceedings arising under any law regulating the immigration of aliens or under the contract labor laws, and section 23 of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

194. Jurisdiction of Certain Proceedings Under the National Banking Acts.—Paragraph 16 gives jurisdiction of proceedings by the United States or of its officers against national banking associations and for winding up the affairs of such banks, and of suits brought by a national bank to enjoin the Comptroller of the Currency or any receiver acting under his direction.

CHAPTER VIII.

DIVERSITY OF CITIZENSHIP.

195. Suits Which May Be Brought in the Federal Courts Because of the State or National Character of the Parties to Them.—We have seen that a suit of a civil nature at law or in equity in which upwards of \$3,000 is in controversy may be brought in a District Court of the United States no matter what may be the nationality or citizenship of any of the parties, provided it arises under the Constitution, the laws or the treaties of the United States. We have now to consider those suits which may be there instituted because there are certain kinds of diversity of citizenship or nationality between the opposing parties. When such diversity of citizenship exists, the Courts of the United States will have jurisdiction, although the dispute does not involve any Federal question. Jurisdiction so arising is commonly spoken of as that dependent upon diversity of citizenship; but not every kind of such diversity suffices to make the controversy one of Federal cognizance.

196. What Kinds of Diverse Citizenship Are Constitutionally Sufficient to Give Jurisdiction to the Federal Courts.—The Constitution declares that the judicial power of the United States shall extend, among other matters, to (a) "controversies between a State and citizens of another State;" (b) "between citizens of different States" * * * and (c) "between a State and the citizens thereof and foreign States, citizens or subjects."¹ It is only when some one of the kinds of diversity of citizenship or nationality so enumerated exists that a controversy may on that ground be brought into the Courts of the United States.

197. District Courts Have No Jurisdiction of Suits Between a State and Citizens of Another State or Aliens.—Subject to the limitations imposed by the Eleventh Amendment, which "recalled" the decision of the Supreme

¹ Constitution, Art. 3, sec. 2.

Court in *Chisholm vs. Georgia*,¹ the Supreme Court has original jurisdiction of all suits of a civil nature to which a State is a party. This jurisdiction is exclusive, except as to controversies between a State and its citizens, or between a State and citizens of other States or aliens, in which cases the Supreme Court has original jurisdiction concurrent with the Courts of the States, but not with the District Courts.

198. District Courts May Have Jurisdiction of Suits Between Citizens of Different States.—Suits between citizens of different States are expressly within the grant of judicial power to the United States and by the Judicial Code original, but not exclusive, jurisdiction of such suits when upwards of \$3,000 is in controversy is conferred upon the District Courts.¹

199. What Does the Constitution Mean by a "State"?—In the second section of the third article of the Constitution declaring the extent of the judicial power of the United States, the word "State" is used either in the singular or in the plural eight times. In one of these it is preceded by the limiting adjective "foreign;" in the other seven it is unqualified. It was early settled that when the Constitution speaks of a State it means a State of the American Union unless the context clearly shows that another meaning is intended.¹ Citizenship which is neither of a State of the Union or of some foreign country cannot give jurisdiction to the Courts of the United States. A citizen of the District of Columbia or of one of the territories is, accordingly, not a citizen of a State. Suits to which he is a party, may not be brought in the Federal Courts if the jurisdiction of those Courts is invoked solely on the ground of diverse citizenship.²

¹ 2 Dallas, 419.

¹ Judicial Code, sec. 24, par. 1, cl. b.

¹ *Hepburn vs. Elzey*, 2 Cranch, 445.

² *Hepburn vs. Elzey*, *supra*; *Corporation of New Orleans vs. Winter*, 1 Wheat. 92.

200. What Makes One a Citizen of a State?—To be a citizen of a particular State one must be a citizen of the United States by birth or naturalization, and he must at one time have been an actual resident of the State in question with intent at the time of such residence to make it either his permanent home or his home for an indefinite period.

201. Citizenship Not Synonymous With Residence.—Residence in a State does not necessarily make one a citizen of it. It follows that the statement that one is a resident of a particular State, is not equivalent, in its legal effect to the allegation that he is a citizen of that State.

A plaintiff was described as a resident of Ohio in the County of Richland. The Supreme Court held that this was not a sufficient allegation that he was a citizen of Ohio.¹

202. Citizenship Not Dependent Upon Length of Residence.—It does not require any particular time to make one who is already a citizen of the United States, a citizen of a State into which he moves. Doubtless he may become a citizen of such State as soon as he has taken up residence therein with intent to make it his permanent home or his home for an indefinite period. This, of course, does not mean that he will be entitled to vote in that State before he has lived in it the length of time prescribed by its Constitution or laws as a qualification for suffrage. One may be a citizen without having the right to vote; for example, a woman is a citizen, although in many States she can not vote.

203. Citizenship Dependent Upon Intent to Acquire Domicile.—While one may become a citizen of a State so soon as he moves into it, he does not become a citizen no matter how long he remains in it, unless when he comes into it, or at some subsequent period he in good faith forms an intention to take up his domicile therein.

¹ Neel vs. Pennsylvania Company, 157 U. S. 153.

Thus, one Gilmer, then a citizen of Alabama, had a suit in the State Courts of that State against the members of the firm of Josiah Morris & Co. They also were citizens of Alabama. He lost his case. The decision below was affirmed by the Supreme Court of the State on the 27th of January, 1886. Shortly thereafter he went to Tennessee. In the following September, he brought suit in the Circuit Court of the United States for the Middle District of Alabama against the same defendants; alleging that he was a citizen of Tennessee. In May or June, 1887, he came back to Montgomery, Alabama, with the intent to reside there permanently. There were other facts shown which satisfied the Supreme Court that he had gone to Tennessee for no other purpose than that of bringing the suit, intending to return to Alabama so soon as he could without imperilling his standing as a plaintiff in the United States Court. The Court held that upon the evidence it could "not resist the conviction that the plaintiff had no purpose to acquire a domicile or settled home in Tennessee, and that his sole object in removing to that State was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal Court to determine his new suit. He was, therefore, a mere sojourner in the former State when his suit was brought." His case was within the rule that "if the removal be for the purpose of committing a fraud upon the law and to enable the party to avail himself of the jurisdiction of the Federal Courts and that fact be made out by his acts, the Court must pronounce that his removal was not with the bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been."¹

204. Motive for Change of Domicile Immaterial.—There is a distinction here which must not be lost sight of.

¹ Morris vs. Gilmer, 129 U. S. 315.

If the change of residence and domicile is actually made, the motive or combination of motives inducing the party to make it is not material. It may be that he has moved from one State to another for the purpose of qualifying himself to bring his case in the Federal Court. If the removal was with the *bona fide* intention of taking up his permanent domicile in the new State he, so soon as he arrives there, becomes a citizen of it; and his right to sue is a "legitimate, constitutional and legal consequence not to be impeached by the motive of his removal."¹

205. A State is Not a Citizen.—It would seem from the nature of the case, as well as from the language of the Constitution and of the Judiciary Act, to be sufficiently plain that a State is not a citizen within the meaning here intended. The Supreme Court had, however, to decide the point.

The State of Alabama brought suit against the Postal Cable and Telegraph Co. for taxes alleged to be due by it. There was the necessary jurisdictional amount involved. The defendant removed the case to the Circuit Court of the United States for the Middle District of Alabama, where the State won its suit, recovering judgment for nearly \$4,000. The defendant appealed to the Supreme Court of the United States. The latter held that, as the State was not a citizen, the case was improperly removed into the Federal Court. It reversed the judgment, and remanded the cause to the Circuit Court with instructions to send it back to the State Court. It imposed the costs, both in the Circuit and the Supreme Courts, on the Telegraph Company because it had improperly removed the suit.¹

This case illustrates the vigor with which the Supreme Court represses any attempt to extend the jurisdiction of the Courts of the United States beyond the limits fixed by the statutes. Apparently both parties were willing that the case should be finally disposed of in the Federal Courts. The Supreme Court none the less held that they had no jurisdiction.

¹ Briggs vs. French, 4 Fed. Cases, 117.

² Postal Telegraph Cable Co. vs. Alabama, 155 U. S. 482.

206. Diverse Citizenship Does Not Exist Unless Every Plaintiff is of Different Citizenship From Any Defendant.—One of the most interesting, as well as practically important, questions in the law of jurisdiction as dependent upon diverse citizenship, is as to the status of corporations. It is impossible to understand the history of the law in this connection, without bearing in mind that the Supreme Court early held that diverse citizenship does not exist unless every plaintiff is a citizen of a different State from that of any defendant, or, as the same rule is otherwise expressed, jurisdiction on the ground of diverse citizenship cannot be sustained unless every plaintiff is entitled to sue every defendant.¹ It is sufficient here to state the rule. It will be more fully discussed later.

207. Citizenship of Corporations.—Corporations are continually suing and being sued in the United States Courts. In many cases, the only ground of jurisdiction is the diversity of citizenship, yet, from many important standpoints, corporations are not citizens. How is it, that if they are not, the Federal Courts, on the ground of diverse citizenship, take jurisdiction of suits by or against them? The explanation requires the telling of a somewhat long story.

208. Federal Jurisdiction Because of Diversity of Citizenship in Suits to Which Corporations Are a Party Based on Legal Fiction.—It has been said that with one exception Federal Courts have never extended their jurisdiction by resort to a legal fiction, although in other countries, and at other times, such fictions were habitually used to such an end. We come now to that exception.

209. The Genesis of this Modern Fiction.—For some fifteen years or thereabouts after the adoption of the Constitution, it appears to have been assumed that the corporations of a particular State were citizens of it within the meaning of the Third Article of the Constitution. As

¹ *Strawbridge vs. Curtiss*, 3 Cranch, 267.

such they sued or were sued in the Federal Courts. The cases were heard and decided without any question of jurisdiction being raised. In 1805, however, the State of Georgia attempted to tax the Savannah branch of the bank of the United States. The bank said that it was not liable to State taxation, and refused to pay the taxes levied upon it. The Georgia officials thereupon seized \$2,000 of its money, and it sued for trespass. In its declaration, it said it was a citizen of Pennsylvania and the defendants were citizens of Georgia. The defendants pleaded in abatement that the president, directors and company of the Bank of the United States averred themselves to be a body politic and corporate and that in that capacity they could not sue or be sued, plead or be impleaded, in that Court by anything contained in the Constitution and laws of the United States. To this plea the plaintiff demurred. The Circuit Court held the plea good. The bank took a writ of error to the Supreme Court. In an elaborate opinion CHIEF JUSTICE MARSHALL said: "That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the Courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name." The Court held, however, that for such purposes the Courts will disregard the separate existence of the corporation and will look to see who actually compose it, and that if its members be all citizens of one State, it acting for them, may maintain an action in the Courts of the United States against citizens of another State. The Court said that when the plaintiff described itself as a citizen of Pennsylvania it was tantamount to an averment that those who composed it were citizens of Pennsylvania. The plea of the defendants in abatement was therefore held bad.¹

210. Presumption of Identical Citizenship of Corporation and Stockholders Held Rebuttable.—In 1839 certain citizens of Louisiana sued the president, directors and

¹ Bank of the United States vs. Deveaux, 5 Cranch, 61.

company of the Commercial and Railroad Bank of Vicksburg, citizens of Mississippi, incorporated by its legislature. The defendant pleaded, in abatement, that it was a corporation aggregate, and that the incorporators and stockholders of the company were citizens of other and different States, to wit, that Wm. F. Lambeth and Wm. E. Thompson were citizens of the State of Louisiana. Plaintiffs demurred to the plea. The Court below sustained the demurrer. On appeal the Supreme Court reaffirmed the rule that where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the Courts of the United States, if those Courts are to have jurisdiction on the ground of diverse citizenship. Upon the same principle, it was held that all the incorporators must be citizens of a different State from that of the party sued if the corporation aggregate be the plaintiff, or from that of the party suing where it is the defendant. The plea was held good, and the judgment of the Court below reversed.¹

211. Corporations May Be Treated as Citizens.—

At the January Term, 1844, the question again came before the Supreme Court. This time suit was brought by a citizen of New York against the Louisville, Cincinnati & Charleston Railway Co., a corporation of the State of South Carolina. The defendant pleaded that the Court ought not to have or take further cognizance of the action because some of the members of the corporation were not citizens of South Carolina, but were citizens of North Carolina; that the Bank of Charleston, a body corporate, was one of the members of the defendant corporation, and that some of the stockholders of the bank were citizens of New York—that is citizens of the same State as the plaintiff. To this plea the defendants demurred. The demurrer was sustained. There was a verdict and judgment for the plaintiff, and the defendant appealed to the Supreme Court. By a unanimous decision

¹ Commercial & Railroad Bank of Vicksburg vs. Slocumb, 14 Peters, 60.

it held that its former rulings were wrong. The opinion was delivered by MR. JUSTICE WAYNE. He reviewed the earlier cases and said that the case of *Strawbridge vs. Curtis*, which, as has been stated, decided that where there are two or more joint plaintiffs and two or more joint defendants each of the plaintiffs must be capable of suing each of the defendants, in the Courts of the United States in order to support the jurisdiction, and the case of the *Bank vs. Devaux*, already cited,

“have never been satisfactory to the Bar, and that they were not, especially the last, entirely satisfactory to the Court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late Chief Justice, who gave them. It is within the knowledge of several of us that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one the conclusion would be different. We think we may safely assert that a majority of the members of this Court have at all times partaken of the same regret, and that whenever a case has occurred on the circuit involving the application of the case of the *Bank vs. Deveau* it was yielded to because the decision had been made and not because it was thought to be right.” * * * “The case of the *Bank of Vicksburg vs. Slocomb* was most reluctantly given upon mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet been done. It has led to a review of the principles of all the cases. We cannot follow further, and upon our maturest deliberation we do not think the cases relied upon for a doctrine contrary to that which the Court will here announce are sustained by a sound and comprehensive course of professional reasoning.”¹

The Court then expressly decided that

“a corporation created by and doing business in a particular State is to be deemed as a person, although an

¹*Louisville R. R. Co. vs. Letson*, 2 How. 550.

artificial person, an inhabitant of the same State for the purposes of its incorporation, and capable of being treated as a citizen of that State as much as a natural person."

212. Presumption of Identical Citizenship of Corporations and Members Held Irrebuttable.—Nine years later the subject was again fully considered by the Supreme Court. One Marshall, a citizen of Virginia, brought suit against the B. & O. R. R. Co. in the Circuit Court of the United States for the District of Maryland. He claimed that the company owed him \$50,000 under a special contract for services in procuring the passage, by the Virginia Legislaturé, of an Act granting it a right of way. In his declaration he said the defendant was a body corporate by the Act of the General Assembly of Maryland. His description of it was of precisely the same character as that which had been held insufficient by the Supreme Court some forty-four years before.¹ The Court, however, three of the judges dissenting, said:—

"It is contended that, notwithstanding the Court in deciding the question of jurisdiction, will look behind the corporate or collective name given to the party to find the persons who act as the representatives, curators or trustees of the association, stockholders or *cestui que* trusts, and in such capacity are the real parties to the controversy, yet that the declaration contains no sufficient averment of their citizenship." * * * "If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the 'defendants are a body corporate by the Act of the General Assembly of Maryland' is a sufficient averment that the real defendants are citizens of that State."²

¹ Hope Insurance Co. vs. Boardman, 5 Cranch, 57.

² Marshall vs. B. & O. R. R. Co., 16 How. 328.

213. The Modern Doctrine.—The Supreme Court has not thought it best to carry the case of the *Louisville R. R. Co. vs. Letson*, above cited, to its logical conclusion and to hold that a corporation is a citizen. Such a ruling might embarrass both the States and the Federal Government in dealing with corporate problems. On the other hand, it is highly desirable that the Federal jurisdiction shall extend to cases in which corporations are parties. The Court has solved the difficulty by resorting to the fiction already alluded to. The present doctrine of the Court was stated by it some thirty years ago. It is to the effect that a suit may be brought in the Federal Courts by or against a corporation. In such case it is regarded as a suit by or against the stockholders. For the purposes of jurisdiction, it is conclusively presumed that all of them are citizens of the State which by its laws created the corporation.¹

This is precisely the same sort of irrebuttable presumption which the Court of King's Bench made that its suitors were in the custody of the warden of the Marshalsea, or the Court of Exchequer that they were debtors to the King. The legal presumption is sometimes very far away from the actual facts.

214. Jurisdiction Cannot Be Created by Organizing a Sham Corporation.—The Supreme Court has, however, intimated that there is such a thing as riding even a good fiction to death.

A couple of ingenious Georgia attorneys thought they could increase their practice if they were in a position to take into the United States Court any ejectment case. They entered into communication with another ingenious and energetic person. He was a South Dakota lawyer. In three years he had secured for non-residents 985 charters under the laws of his State. Part of his business was to furnish South Dakota incorporators when necessary. Under the name of the Southern Realty Investment Co., a South Dakota cor-

¹ *Muller vs. Dows*, 94 U. S. 445.

poration was formed which had a president and a board of directors, all of whom were citizens of Georgia. Two of the five directors were the Georgia attorneys; one was their female stenographer. The president and a majority of the directors were the holders each of only one share of stock; and that donated. They recognized it to be their duty to represent the Georgia attorneys and to obey their will implicitly. The company, in respect of all its business, was the agent of those attorneys to do their bidding. Its president testified that he did not know for what purpose the company was really organized, or that it had ever done any business except to bring certain ejectment suits in the United States Court, or that it had any money. Its place of business in Georgia was in the office of the Georgia attorneys. Its pretended place of business in South Dakota was in what is called a domiciliary office, maintained by the attorney in that State who procured its charter. In the latter office the Supreme Court remarked there could have been found, no doubt, a desk and a chair or two, but no business. The company's president never knew of its doing any business in South Dakota. The Supreme Court held, that it must be deemed a mere sham; that the actual parties to the suit were the citizens of Georgia for whose real benefit the litigation was being carried on, and that the United States Court had no jurisdiction.¹

215. The Fiction Does Not Extend to Joint Stock Companies or Limited Partnerships.—The Supreme Court has, moreover, shown that it is not willing to extend the legal fiction to organizations which are not corporations in every sense of the word. It has expressly decided that joint stock companies and limited partnerships are not entitled to the benefit of the presumption.

The United States Express Company brought a suit in the United States Circuit Court for the Northern District of Illinois. It described itself as a joint stock company organ-

¹ Southern Realty Investment Co. vs. Walker, 211 U. S. 603.

ized under the laws of the State of New York and a citizen of that State. The defendant was described as a citizen of Illinois. The question of jurisdiction was not raised below. Neither of the parties suggested it in the Supreme Court, but the latter of its own motion held that there was no jurisdiction. It said the

“allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is not a corporation, but a joint stock company—that is, a mere partnership.” * * * “Although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power by that name to sue in a Federal Court. The company may have been organized under the laws of the State of New York and may be doing business in that State, yet all the members of it might not be citizens of that State. The record does not show the citizenship” * * * “of any of the members of the company. They are not shown to be citizens of some State other than Illinois.”¹

216. New Equity Rule 37.—New Equity Rule 37 provides among other things, that every action shall be prosecuted in the name of the real party in interest, but that an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought.

Possibly under this rule it will be held that on the equity side a suit may hereafter be maintained by someone authorized by a State statute to sue on behalf of a joint stock company or a limited partnership, provided the citizenship of such plaintiff be different from that of any of the defendants. The rule may be construed to make the citizenship of the persons for whom he sues immaterial.

¹ Chapman vs. Barney, 129 U. S. 677; Great Southern Fire Proof Hotel Co. vs. Jones, 177 U. S. 450.

217. Municipal Corporations Treated as Citizens of Their State.—Municipal corporations chartered by a State are, for the purposes of the jurisdiction of the United States Courts, held to be composed solely of its citizens; where the amount in controversy is sufficient, they may be sued in the United States Courts by a citizen of another State.¹

218. Controversies Between Citizens of States and Foreign States, Citizens or Subjects.—In addition to conferring jurisdiction upon the District Courts of civil suits at law or in equity in which the matter in controversy exceeds \$3,000, the first paragraph of section 24 of the Judicial Code gives jurisdiction to those Courts over such suits when they are between citizens of a State and foreign States, citizens or subjects.

219. Place of Actual Residence of Alien Immaterial.—If one of the parties to the controversy is a citizen or subject of a foreign power, the place of his actual residence is immaterial.

Many years ago two citizens of the Republic of Switzerland, residing and trading in the City of New Orleans, brought suit against certain citizens of Louisiana in the District Court of the United States for that district. It was objected that the United States Court had no jurisdiction because the plaintiffs, though aliens, were residents of Louisiana. CHIEF JUSTICE MARSHALL said:—

“The residence of aliens within the State constitutes no objection to the jurisdiction of the Federal Courts.”¹

220. No Length of Residence Will in Itself Turn an Alien Into a Citizen.—A foreign citizen or subject remains an alien until he has been completely naturalized by the granting of his final papers.

¹ Cowles vs. Mercer County, 7 Wall. 118.

¹ Breedlove vs. Nicolet, 7 Peters, 428.

A native born subject of the Grand Duchy of Mecklenburg immigrated to the United States many years before the case arose. Shortly after his arrival he declared his intention to become a citizen of the United States—that is to say, in common phrase, he took out his first papers. For fifteen years thereafter he resided in Minnesota, and, as its Constitution authorized, had frequently voted at its elections. Under that Constitution he was eligible to State office. He sued a citizen of Minnesota. It was objected that the United States Court was without jurisdiction. MR. JUSTICE MILLER, then on Circuit, said:—

“The plaintiff is undoubtedly a subject of the Grand Duke of Mecklenburg, having been born such, unless something has been done since his coming to this country to change that relation. It will hardly be contended that length of residence, even with the intention never to return, can have that effect, nor can the incomplete movement towards naturalization under the laws of the United States. The moving counsel then must rely on the Constitution of the State of Minnesota and the action of plaintiff under it to change his citizenship. I am of opinion that no State can make the subject of a foreign prince a citizen of the State in any other mode than that provided by the naturalization laws of Congress.” * * * “But I do not place the decision of the present case on that ground. The State of Minnesota has not attempted to make the plaintiff a citizen of that State, nor do the provisions of her Constitution when applied to the condition of the plaintiff have that effect. The error has arisen from the same confusion of ideas which induced the advocates of female suffrage to assert in the Supreme Court the right of women to vote. That assertion is based upon the proposition that citizenship and the right to vote are inseparable. Therefore, females who are citizens must be allowed to vote. This was unanimously overruled by this Court. The present case is based upon the same idea.”¹

221. All Stockholders of a Foreign Corporation Conclusively Presumed Aliens.—The same legal fiction is applied to foreign as to domestic corporations.

¹ *Lanz vs. Randall*, 4 Dillon, 425; 14 Fed. Cases, 1131.

All the stockholders of a corporation chartered by a foreign country are conclusively presumed to be citizens or subjects thereof.

The United States Court has jurisdiction of suits brought by citizens of any State against a corporation chartered by a foreign country and of suits by such corporation against a citizen of any of the States, provided the proper jurisdictional amount be involved. Such suits are controversies between citizens of a State and foreign States, citizens or subjects.¹

222. Foreign State or Sovereign May Sue in Federal Courts.—Both the Constitution and the Judicial Code authorize a foreign State to sue in the Courts of the United States.

In the harbor of San Francisco in December, 1867, the American ship *Sapphire* collided with a French transport. Two days later, in the District Court of the United States, a libel against the *Sapphire* was filed in the name of Napoleon III, Emperor of the French, as the owner of the transport. A decree was entered in favor of the Emperor for \$15,000. An appeal was taken to the Supreme Court. While the case was there pending Napoleon was deposed. A Republic was established and recognized by the United States. The Supreme Court said:—

“A foreign sovereign as well as any other foreign person who has a demand of a civil nature against any person here may prosecute it in our Courts.” * * * “The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the transport, “not as an individual, but as sovereign of France.” * * * “On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign State is the true and real owner of its public vessels of war.”¹

¹ *Steamship Co. vs. Tugman*, 106 U. S. 118.

¹ *The Sapphire*, 11 Wall. 164.

The case cited was a libel in admiralty. The jurisdiction did not, of course, depend upon the first paragraph of section 24 of the Judicial Code, which we have been particularly considering, but the principles there laid down are applicable to cases brought thereunder. It was under it the Republic of Columbia filed a bill of complaint in the Circuit Court for the District of West Virginia against the Cauca Company to set aside an award under a submission made by that Republic and the defendant company.²

223. Record Must Show Alienage.—In cases brought under this clause of the statute the record must clearly show that the alien is a citizen or subject of a foreign power; precisely as in cases in which the ground of jurisdiction is the diverse State citizenship of the parties, the citizenship of every party must be clearly stated.

224. Every Plaintiff Must Be of Diverse Citizenship From Any Defendant.—As already stated, in order that there shall be jurisdiction in the Federal Courts on the ground of diversity of citizenship, each plaintiff must be capable of suing each of the defendants in the Courts of the United States. More than a century ago the Supreme Court so ruled.¹

Nearly forty years afterwards JUSTICE WAYNE, speaking for the Court, said that CHIEF JUSTICE MARSHALL regretted having ever made the decision. It remains, however, the unquestioned law. It is one of the cardinal principles governing the jurisdiction of the Federal Courts and must be kept steadily in mind by every practitioner in them. It has been constantly applied, and, at times, with what must have seemed to disappointed litigants, remorseless logic.

A citizen of the State of Kentucky and a citizen of the Mississippi territory united, as plaintiffs, in a suit in the District Court of the United States for the District of

² Columbia vs. Cauca Co., 190 U. S. 524.

¹ Strawbridge vs. Curtis, 3 Cranch, 267.

Louisiana, against a Louisiana corporation. It was held that the Court had no jurisdiction because a citizen of a territory is not a citizen of a State. The Court said:—

“it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the Court is incapable of distinguishing their case so far as respects jurisdiction from one in which they were compelled to unite.”²

Wherever any party to a case is incapable of suing in the Federal Court any party on the opposite side, the Court is without jurisdiction. If the suit is brought by a person or persons who, or each of whom, is capable of suing all the defendants, and it appears that there is an indispensable party who has been omitted, then the case fails because of his omission.³ If his citizenship is such that if he were joined the Court would not have jurisdiction, and it is attempted to join him by amendment, the case will also fail, because it will then be manifest that the Court is without jurisdiction.

In the case last cited, the bill was filed originally in the Supreme Court of the United States by the State of California against the Southern Pacific Co., a corporation of Kentucky. The issues involved in the litigation, in the opinion of the Supreme Court, affected the rights of the City of Oakland and the Oakland Water Front Co. The Court held that it ought not to proceed in their absence. If they were brought in, then the suit would be between the State of California on the one side and a citizen of another State and citizens of California on the other, and the Federal Courts would not have jurisdiction.

225. Parties Not Indispensable Need Not Be Joined.

—If any person whose presence upon the record would destroy jurisdiction, is not an indispensable party, he need not be joined and jurisdiction may be maintained.

² Corporation of New Orleans vs. Winter, 1 Wheat. 91.

³ California vs. Southern Pacific Co., 157 U. S. 229.

Under a statute of Alabama every joint promissory note had the same effect in law as if it were joint and several. Whenever a writ issued against two or more joint and several drawers of a several promissory note, it was lawful, at any time after the return, to discontinue the action against any one or more of the defendants on whom the writ had not been executed and to proceed to judgment against the others.

A suit was brought in the United States Circuit Court for the District of Alabama on a joint promissory note against the two makers. One was summoned; the other was not found. The declaration was filed against the one who had been served with process and alleged him to be a citizen of Alabama, the plaintiff being described as a citizen of New York; nothing was said as to the citizenship of the other defendant. The Supreme Court held that, under the laws of Alabama, the plaintiff might proceed solely against the maker who was found, and his citizenship and that of the plaintiff were alone material.¹

226. Section 50, Judicial Code.—Shortly before the case last cited was decided, Congress had legislated upon the subject. The Act in question now constitutes section 50 of the Judicial Code. It provides that when there are several defendants in any suit at law or in equity and one or more of them are neither inhabitants of, nor found within, the district in which the suit is brought, and do not voluntarily appear, the Court may entertain jurisdiction and proceed to trial and adjudication between the parties who are properly before it. The non joinder of parties who are neither inhabitants of, nor found within, the district, does not constitute matter of abatement or objection to the suit. Of course, no judgment or decree will bind anyone who is not a party.

The Thirty-ninth Equity Rule of the Supreme Court is very similar. It provides that in all cases where it shall

¹ Smith vs. Clapp, 15 Peters, 125.

appear to the Court that persons, who might otherwise be deemed necessary and proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the Court or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction; the Court may, in its discretion, proceed without them, and the decree shall be without prejudice to their rights.

227. Difference Between Necessary and Indispensable Parties.—It follows that, in the Federal Courts, many persons who under the old chancery practice would have been held to be necessary, are not considered indispensable parties. Whenever either at law or in equity the Federal Courts can do justice as between the parties before them, they will not refuse to proceed because other parties have not been brought in, provided those other parties could not have been joined without defeating jurisdiction.

A citizen of Illinois brought suit against co-partners who were doing business in Wisconsin. He alleged they were citizens of the latter. He caused their partnership property to be attached. They all appeared. Two of them set up that they were citizens of Illinois. Under the State practice, he was entitled, at this stage of the proceedings, to discontinue against such of the defendants as were without the jurisdiction of the Court. He did discontinue as to the two citizens of Illinois. The Supreme Court thought he had the right so to do. The Federal Court had jurisdiction to hear and determine the controversy and to hold the property for the debt for which it was attached. Service on one partner when one partner is alone within the jurisdiction is sufficient to bind the partnership property. The judgment recovered in the case did not affect the property of the partners against whom the proceedings had been discontinued other than that of the partnership actually within the jurisdiction of the Court.¹

¹ *Imbush vs. Farwell*, 1 Black, 566.

228. Parties Without Whose Presence Justice Cannot Be Done Are Indispensable.—Nevertheless, a Federal Court will not decide a controversy when it can make no decision going to the real root of the matter, without necessarily affecting the rights of parties not before it. The Supreme Court has said:—

“We do not put the case upon the ground of jurisdiction, but upon a much broader ground which must equally apply to all Courts of Equity, whatever may be their structure as to jurisdiction. We put it on the ground that no Court can adjudicate directly upon a person’s right without the party being either actually or constructively before it.”¹

229. Whose Citizenship Controls Where Suit in Name of One Person, But for Benefit of Another?—In some cases suits are, by statute or custom, required to be brought for one person in the name of another. In other cases, while the suit is brought by one person in his own name, it is another individual who will really gain or lose by the result of the litigation. In such cases it is necessary to know whose citizenship it is which determines whether the parties to the litigation are or are not citizens of different States.

230. Citizenship of Purely Nominal Parties Immaterial.—In Maryland, the bonds of trustees, administrators and executors, as well as of various officials, are given to the State of Maryland. They are for the protection and benefit of whomsoever may be interested in the proper discharge of the duties of the trustee, the administrator or the officer. The persons so interested may be citizens of Maryland, or they may be citizens of other States or of foreign countries. If the bond is breached and the injured parties are all citizens of States other than Maryland, or are aliens, has the Federal Court jurisdiction? The nominal plaintiff is the State of Maryland. It is not a citizen. If it were a citizen in any sense it would be a citizen of the same State

¹ Mallow vs. Hinde, 12 Wheat. 198.

with the defendants, assuming that the principal and the sureties on the bond were all Marylanders.

This question came before the Supreme Court a hundred years ago. In Virginia, executors then gave bonds to the justices of the peace of the county. A citizen of Virginia died, indebted to a British subject. Letters testamentary were granted to a citizen of Virginia, who, with another Virginian as his surety, gave bond to the justices of the peace for the county of Stafford. The executor wrongfully withheld the payment of the debt due the British subject. The latter began suit in the United States Court for the District of Virginia. His declaration was filed in the name of the justices of the peace of the county of Stafford to his use. The Supreme Court said the suit was properly brought. The Federal Court had jurisdiction.¹

The ground of the decision was that the justices of the peace were nominal parties only; that the real contest was between the British subject and the citizen of Virginia, and of such a controversy the Federal Court had jurisdiction. For this reason, when an infant sues by his next friend it is the citizenship of the infant and not of the next friend which determines whether there is a diversity of citizenship between the plaintiff and the defendant. The next friend is in some sort an officer of the Court. He is appointed merely to look after the interests of the infant. The judgment is binding on the latter, who cannot, when he attains full age, maintain a fresh proceeding founded on the same cause of action.

231. Citizenship of Representative Parties Controlling.—A plaintiff who brings a suit may be a good deal more than a nominal party, although other persons may have a more direct personal interest in the outcome of the litigation. Such is the case with executors, administrators and trustees.

A Georgia citizen died. His administrator and his residuary legatee were French subjects. They brought suit

¹ Browne vs. Strode, 5 Cranch, 303.

against a citizen of Georgia. It was held that the United States Court had jurisdiction. The plaintiffs were aliens. They sued as trustees, it is true, but they were something more than nominal parties. They had actual title in themselves, although the beneficial interest may have been in someone else.¹

In another case a suit was brought in the Federal Court by the executor of the surviving partner of a firm. The declaration said that the executor was a citizen of Maryland. The defendants were alleged to be citizens of Tennessee. Nothing was said as to the citizenship of the persons who originally composed the firm or of those who were entitled to share in the estate of the surviving partner. The Court held that no such allegations were necessary. The citizenship of the executor was the only one material on his side of the case.²

A citizen of New York and a citizen of Pennsylvania brought suit in the Federal Court against a Pennsylvania corporation. They described themselves as trustees who sued solely for the use of an alien, a subject of Great Britain and of a citizen of New Jersey. The Supreme Court held that the Federal Courts were without jurisdiction. Distinguishing the case from such as *Browne vs. Strode*, it said:

“There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees and held nothing for the use or benefit of the real parties in interest. They could not” * * * “prevent the institution or prosecution of the actions or exercise any control over them.” * * * “In the case at bar the plaintiffs are the real prosecutors of the suit. They are parties to the mortgage contract negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved and to them the usual obligations of mortgagors are made.”³

232. Citizenship at Time Suit Brought Controls.—

At the time a contract is entered into or a tort committed.

¹ *Chappelaine vs. Dechenaux*, 4 Cranch, 308.

² *Childress vs. Emory*, 8 Wheat. 668.

³ *Coal Co. vs. Blatchford*, 11 Wall. 174.

one of the parties may be a citizen of a particular State. By the time the suit is brought, he may be a citizen of another. Before judgment is rendered, he may move again and become a citizen of a third, or after suit brought one of the parties may die and his executor or administrator may be a citizen of a State other than his. At what time must the parties be citizens of different States in order to give the Federal Courts jurisdiction? The only time of importance is that at which the suit is brought. It matters not of what State the parties were citizens when the contract was made or the tort committed, or of what State they become citizens after the suit is instituted. If they are citizens of different States at the time of the institution of the action, the Federal Court has jurisdiction, and, once properly taken, no subsequent change of citizenship or of parties may oust it.

Citizens of Ohio brought suit in the United States Circuit Court for the District of Kentucky against citizens of Kentucky. Before decree, one of the complainants removed from Ohio and became a citizen of Kentucky. The Supreme Court held that change of residence did not divest the jurisdiction.¹

233. Citizenship at Time of Bringing Original and Not Ancillary or Supplemental Suit Controls.—

In the Circuit Court of the United States for the District of Rhode Island, a citizen of Connecticut filed a bill in equity against certain citizens of Rhode Island. During the pendency of the proceeding, he died, and a Rhode Island administrator for his estate was appointed. The latter filed a bill of revivor. The Circuit Court dismissed the bill for want of jurisdiction on the ground that both the parties to the new bill were citizens of Rhode Island. The Supreme Court said:—

“We are of opinion that the Court erred. The bill of revivor was in no just sense an original suit, but was a mere continuation of the original suit. The parties to the original bill were citizens of different States and the

¹ *Morgan's Heirs vs. Morgan*, 2 Wheat. 297.

jurisdiction of the Court completely attached to the controversy. Having so attached, it could not be divested by any subsequent events.”¹

Citizens of Pennsylvania brought an action of ejectment in the United States Circuit Court for the District of Missouri against the tenant in possession, a citizen of Missouri. Under a State statute the landlord of the defendant, who was a citizen of Pennsylvania, applied to be admitted as a co-defendant. The permission was granted. The defendants then moved to dismiss the case for want of jurisdiction because there were citizens of Pennsylvania on each side of the record. The Supreme Court said:—

“It was quite proper” * * * “for the Circuit Court to admit the landlord as a party for the purpose of defending his tenant’s possession and through that, his own title; and to this end he might not only be permitted to appear as a party to the record and co-defendant, but to control the defense as *dominus litis*, raising and conducting such issues as his own rights and interests might dictate. And this need not arrest or interfere with the jurisdiction of the Court, already established by the plaintiffs against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired and auxiliary to it.”²

¹ Clarke vs. Mathewson, 12 Peters, 171.

² Phelps vs. Oaks, 117 U. S. 240.

CHAPTER IX.

VENUE OF ACTIONS IN THE FEDERAL COURTS.

234. Consideration of the Provisions of Paragraph 1, Section 24, of Judicial Code Limiting Jurisdiction of Suits By Assignees Postponed.—The paragraph so long under discussion contains another provision of much practical importance. By it the jurisdiction of the District Courts over suits brought by assignees is greatly limited. The Court is forbidden to take jurisdiction of a suit upon a chose in action unless such suit could have been prosecuted in such Court, had no assignment been made.

We shall hereafter see that by a construction put upon this provision by some authorities, no assignee can sue in any particular District Court unless suit could have been there brought had no assignment been made.

It will tend to clearness, therefore, if we first inquire in what District Court or Courts a plaintiff is required to bring his suit.

235. In What District or Districts a Plaintiff May Sue—Statutory Rules.—The United States is a very large country. It has many Federal judicial districts. If a plaintiff might sue a defendant in any of them he chose, he would have an instrument of oppression ready to his hands. Congress has been careful to prevent any such abuse. When the original Judiciary Act was passed, and for many years afterwards, arrest of the person was a common method of beginning many civil suits. The 11th section of the original Judiciary Act provided that

“no person shall be arrested in one district for trial in another, in any civil action, * * * and no civil suit shall be brought * * * against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”

By the Act of March 3, 1887, the possible venue of civil actions in the Federal Courts was still further limited. The provision then made is substantially reproduced in section 51 of the Judicial Code, which declares that, with certain exceptions, to be hereafter alluded to

“no person shall be arrested in one district for trial in another in any civil action before a District Court,” and that (1) “no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,” (2) “but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”

236. Statutory Rules as to Venue Not Applicable to Suits Against Aliens.—In section 11 of the original Judiciary Act, the provisions protecting defendants from being sued except in particular districts were expressly limited to “inhabitants of the United States.” In subsequent revisions and changes those words have been omitted, but the Courts have held that such omission was not intended to change the meaning. To hold otherwise would be to decide that Congress had in effect directed that many aliens should not be suable at all in the Courts of the United States.

In the language of the Supreme Court,

“to construe the provision as applicable to all suits between a citizen and an alien would leave the Courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole.”¹

237. Aliens and Alien Corporations Suable in Any Federal District in Which Service Can Be Had.—One Michael Kane, a resident of New Jersey, was a passenger on the *Devonia*, belonging to the Barrow Steamship Co., a British corporation. When in the port of London-

¹ *In re Hohorst*, 150 U. S. 660.

derry, Ireland, and while on the ship, he was assailed and beaten by one of its officers. He brought suit against the Company in the Circuit Court of the United States for the Southern District of New York and had the summons served on its duly appointed agents in New York, where it had property. The Supreme Court held that the Circuit Court had jurisdiction; the action was for a personal tort committed abroad, such as would have been actionable if committed in the State of New York or elsewhere in this country, and an action for which might be maintained in any Circuit Court of the United States which acquired jurisdiction of the defendant. The action was within the general jurisdiction conferred by Congress upon the Circuit Courts of the United States.¹

238. Rule I—If Jurisdiction Exists on Any Ground Other Than Diversity of State Citizenship, Suit Can Be Brought Only in the District of Defendant's Residence.

—It will be perceived that where the ground of jurisdiction is anything other than that the action is between citizens of different States, there is only one district in which the suit can be brought, viz: the district of which the defendant is an inhabitant. Where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit may be brought in the district in which either the plaintiff or the defendant resides. What will happen if the plaintiff, a citizen of one State, sues the defendant, a citizen of another, in the district of the residence of the plaintiff upon a cause of action arising under a Federal law?

Certain citizens of Georgia filed a bill in equity against the Atlantic Coast Line and a number of other railroad companies, all of which did business in Georgia, but were incorporated under the laws of other States. The suit was brought in the district of the residence of the plaintiffs. Diverse citizenship existed between them and defendants, but the object of the bill was to assert rights under the Interstate

¹ Barrow Steamship Co. vs. Kane, 170 U. S. 100.

Commerce and Anti-Trust Acts. Jurisdiction, consequently, did not rest solely upon diverse citizenship, although, upon the facts in the case, that would have been sufficient to have sustained the jurisdiction of the Court. Nevertheless, had the parties been all citizens of the same State, the suit could still have been brought in a Federal Court. A Federal question was involved. The Supreme Court held that the Circuit Court for the Southern District of Georgia was without jurisdiction.¹

239. Rule II. Where Sole Ground of Jurisdiction is Diverse State Citizenship Suit May Be Brought in the District of the Residence of Either Plaintiff or Defendant.—Where the jurisdiction rests on diverse State citizenship only, the action may be brought in the district of the residence of either the plaintiff or the defendant; but a suit instituted in the residence of the plaintiff can effect nothing unless he is able there to secure the services of process on the defendant.

If a citizen of Maryland in the District Court of the United States for the District of Massachusetts sues a citizen of the latter State, he ordinarily will have no difficulty in securing service of process and in carrying the case through to an end. The plaintiff has the right, however, to bring his suit in the District Court of the United States for the District of Maryland, but the case will not make any progress unless the defendant either comes into the District of Maryland and is summoned therein, or voluntarily instructs counsel to enter an appearance for him.

240. Of What District Defendant is an Inhabitant.—Resident and inhabitant in this clause of the statute mean the same thing. A natural person is an inhabitant of the district in which he has his regular home or domicile. A corporation is a resident or inhabitant of the State by which it is incorporated; if that State is divided into more than

¹ *Macon Grocery Co. vs. Atlantic Coast Line*, 215 U. S. 501.

one district, it is an inhabitant of the district in which its general business is carried on, and in which it has its headquarters and general offices. It cannot be said to be an inhabitant of the other Federal districts, although it may operate a line of railroad through them and maintain therein freight and ticket offices and stations.¹

241. Defendant's Right to Object to Suit in Wrong District May Be Waived.—An objection to the right of the Court to entertain the action on the ground that the case itself is not one over which the Court has jurisdiction, is of a very different kind from the contention that the defendant is not properly suable in that particular district.

If a citizen of one State sues a citizen of the same State in the Federal Court, and there is no Federal question involved, the Court has not jurisdiction and never can get it. No possible consent of the parties, and no waiver by one or both of their rights can confer it. The same consequences would follow if the suit was between a citizen of a State and a citizen of the District of Columbia or of a territory.

On the other hand, an objection based solely on the ground that a defendant is not properly suable in the particular district in which suit has been brought against him, does not go to the constitutional, nor, in a sense, to the statutory, jurisdiction of the Court over the cause of action. The right not to be sued outside of the districts described in the statute is a privilege conferred upon the defendant. He may waive it. He does waive it by appearing generally to the action.

242 General Appearance by Defendant Waives It.—Thus, when the statute provided that suit must be brought in the district of which the defendant was an inhabitant, or in which he could be found, suit by process of foreign attachment was brought by a citizen of Pennsylvania, in the Circuit Court of the United States for the Eastern District of Pennsylvania, against a citizen of Massachusetts then resid-

¹ Galveston Railway Co. vs. Gonzales, 151 U. S. 496.

ing abroad at Gibraltar. The defendant entered a general appearance and afterwards objected to the jurisdiction. The Supreme Court said:—

“It appears that the party appeared and pleaded to issue. Now, if the case were one of a want of jurisdiction in the Court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The Court had jurisdiction over the parties and the matter in dispute, the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him. This was a personal privilege or exemption, which it was competent for the party to waive.”¹

243. Objection Not Waived by Defendant Appearing Specially to Object.—Of course, the objection to jurisdiction is not waived by filing a demurrer for the special and single purpose of objecting to the jurisdiction nor by answering to the merits upon that demurrer being overruled.¹

A plaintiff was a citizen of Texas and a resident of the Eastern District thereof. The defendant was a Kentucky corporation doing business in the Western District of Texas and having an agent in that district qualified under the State law to accept service of process. The suit was brought in the Circuit Court of the United States for the Western District of Texas. The Supreme Court held that a corporation is not a citizen or resident of a State in which it is not incorporated, and there being no waiver by general appearance or otherwise, the Court never acquired jurisdiction.

244. When Service May Be Obtained on a Corporation Sued in District of Plaintiff's Residence.—Where jurisdiction is exclusively based on diverse citizenship a corporation incorporated by one State may be sued in the district of another State in which the plaintiff resides, provided service of process can be secured upon it in the latter dis-

¹ Toland vs. Sprague, 12 Peters, 330.

² Southern Pacific Co. vs. Denton, 146 U. S. 203.

trict; which is possible when the corporation carries on business therein.

The plaintiff was a citizen of New York. The defendant was a corporation of Virginia. Suit was brought in the Circuit Court of the United States for the Southern District of New York. Service was had upon two of the directors of the defendant corporation, residing in the City of New York. The corporation was not doing any business in that State. The Supreme Court held that the residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially representing the corporation in its business. In other words, the corporation must be doing business there, either generally or specially.¹

245. When is a Corporation Doing Business in a District so That it May be Sued Therein?—It is not always easy to say whether a corporation is doing business in a particular district to such an extent and in such a way that it is liable to be sued therein. For example—a Pennsylvania corporation made a contract in Maryland with a Maryland corporation to do work in Illinois. The Maryland corporation alleged that the Pennsylvania corporation broke its agreement. The vice-president of the latter had acted for it in making the contract. It sent him to Baltimore to confer with the Maryland corporation as to the dispute. While in that city on that errand he was served with a summons upon his company in a suit which the Maryland corporation had brought upon the contract in the United States District Court for Maryland. It was clear that the Pennsylvania corporation was not doing business generally in Maryland. With much doubt and hesitation, it was held that it was not there doing business specially, of a character which rendered it liable to suit therein.¹

In this case the authorities are reviewed.

¹ Conley vs. Mathieson Alkali Works, 190 U. S. 406.

¹ Noel Construction Co. vs. George W. Smith & Co., 193 Fed. 492.

Reference may also be had to a later decision of the Circuit Court of Appeals for the Ninth Circuit.²

Upon the facts the two cases may be distinguished. It is, however, doubtful whether the Circuit Court of Appeals for the Ninth Circuit would have deemed the differences material.

246. Each Plaintiff Must Be Entitled to Sue Any Defendant in District in Which Suit is Brought—Where there are two defendants, each citizens of different States, and two plaintiffs, each citizens of different States, if all the parties are necessary parties, it will be impossible to find any District Court of the United States which will have jurisdiction, because there is no district which is the place of residence of both the plaintiffs and there is no district which is the place of residence of both the defendants. The Supreme Court has decided that the suit can be brought only in a district in which either all the plaintiffs or all the defendants reside.

A citizen of Missouri and a citizen of Arkansas, as plaintiffs in the Circuit Court for the Eastern District of Missouri, brought suit against a defendant, who was a citizen of the State of Texas. The defendant objected that the Court had no jurisdiction because the district was not the district of the residence of one of the plaintiffs and was not the residence of the single defendant. The Supreme Court held that the objection was well taken; that Congress had shown in the Acts of 1887 and 1888 no intention to enlarge, but rather to diminish, the jurisdiction of the United States Courts, and that the language used by it in defining that jurisdiction must be understood in the light of the construction put upon similar phrases in *Strawbridge vs. Curtis*,¹ and adhered to for ninety years thereafter.²

² *Premo Specialty Mfg. Co. vs. Jersey-Creme Co.*, 200 Fed. 352.

¹ 3 Cranch, 267.

² *Smith vs. Lyon*, 133 U. S. 315.

247. Two Plaintiffs Residing in Different Districts May Sue Defendant in a Third District of Which He is a Resident.—On the other hand, where there are two plaintiffs, each residents of different States, and there is a single defendant, resident in a third, the two plaintiffs may sue him in the district of his residence.

A citizen of New York and a citizen of Pennsylvania as plaintiffs sued in the Northern District of West Virginia a defendant corporation organized under the laws of the State of West Virginia. The Supreme Court held, that the suit was properly brought. It follows, therefore, that if there is a single plaintiff and there are two indispensable defendants, each residing in a different State, he cannot sue either of them in the district of such defendant's residence. He can sue them in the district of his own residence provided he can there get service upon both of them. If there are any number of plaintiffs, all residents of different States from the defendant, they can bring suit in the district in which the defendant resides.¹

248. Federal Courts Can Seldom Issue Non Resident Attachments.—Because of the statutory limitation on the venue of actions, the process of non-resident attachment is practically unknown in the Federal Courts.

The Supreme Court years ago held that an attachment cannot be sued out against a non-resident in any district in which he cannot be sued. When this decision was made the districts in which he could be sued was that of his residence and any other in which he might be found.

An Iowa corporation brought suit in the United States Circuit Court for the District of Iowa against a citizen of Massachusetts. It claimed he was indebted to it in a sum of about \$100,000. He was not within the district of Iowa. The plaintiff attempted to attach his property in the manner

¹ *Sweeney vs. Carter Oil Co.*, 199 U. S. 252.

in which such an attachment could have been sued out in the State Courts of Iowa. The Supreme Court said:—

“No civil suit, not local in its nature, can be brought in the Circuit Court of the United States, against an inhabitant of the United States, by original process, in any other State than that of which he is an inhabitant, or in which he is found at the time of serving the writ.” “It is conceded,” the Court continued, “that the person against whom this suit was brought in the Circuit Court was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa, and unless he could be sued no attachment could issue from that Court against his property.”¹

Since then the statute has been amended, as we have seen, so that when the ground of jurisdiction is diverse citizenship the suit can be brought in the district of the residence of either the plaintiff or of the defendant.

It has been contended that the District Court of the district of plaintiff's residence now has jurisdiction to attach defendant's property found therein, but the Supreme Court has said that

“the amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to personal service or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal Court.”²

249. Attachments Can Be Issued by the District Court When Other Suit Could be Prosecuted Therein.—
A non-resident defendant may be temporarily in the district

¹ *Ex parte Railway Co.*, 103 U. S. 794.

² *Big Vein Coal Co. of West Va. vs. Read*, 229 U. S. 31.

of the residence of the plaintiff. Such defendant may have attachable property in that district. I see no reason why he may not be there sued and his property there attached if under the State law a non-resident attachment could under such circumstances be sued out; nor does there appear to be any reason why an attachment, upon an original process for fraud, when authorized by the State law, could not be brought against a defendant in the United States Court of the district in which he lives and in which property to be attached can be found.

SPECIAL STATUTES REGULATING VENUE IN CERTAIN CASES.

250. Special Provisions for States Which Are Divided Into Two or More Districts.—There are a number of provisions contained in sections 52, 53, 54 and 55 of the Judicial Code defining what may be done in States which are divided into more than one district. In substance they provide that a suit may be brought against two or more defendants who reside in different districts of the same State, in either district. A duplicate writ issues to the Marshal of the other for service upon the defendant there residing.

251. District in Which Local Actions May Be Brought.—Sometimes a plaintiff wants to bring a suit which is of a local nature; as, for example, an action of trespass *q. c. f.* The land lies in one district. The defendant or defendants live in another of the same State. In such case the suit may be brought in that one in which the land lies.

Where the land is in one State and neither plaintiff nor defendant resides therein, it does not appear that the suit can be brought in the United States Court at all. This last statement is true only of those cases which although they grow out of something which has happened with reference to tangible property and are local in their nature, are still actions in which nothing is sought but the recovery of personal damages against the defendant.

Citizens of New York and West Virginia brought suit in the United States Circuit Court for the Eastern District of Tennessee against a corporation of New Jersey and one of Great Britain. The plaintiffs were the owners in fee of many thousands of acres of land in Georgia upon the Tennessee boundary. The lands were devoted to forestry and were of great value. The defendants conducted their business in Tennessee within a short distance of these lands. The fumes from their furnaces, smelters and ovens did great damage to the plaintiff's trees. Each of the defendants had its chief office and place of business within the territorial jurisdiction of the Circuit Court. It was held that the United States Court for the Eastern District of Tennessee had no jurisdiction as against the New Jersey Corporation.¹

252. Section 57 of the Judicial Code—Jurisdiction to Enforce Liens and Remove Encumbrances.—There is a statutory provision dealing with cases which are brought “to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought,” although “one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto.” In such case section 57 of the Judicial Code declares that “it shall be lawful for the Court to make an order directing such absent defendant” * * * “to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant” * * * “if practicable. wherever found, and also upon the person or persons in possession or charge of said property, if any there be, or where such personal service upon the absent defendant” * * * “is not practicable such order shall be published in such manner as the Court may direct, not less than once a week for six consecutive weeks.” If the defendant “shall not appear, plead, answer or demur within the time so limited or within some further

¹ *Ladew vs. Tennessee Copper Co.*, 218 U. S. 357.

time to be allowed by the Court in its discretion," the Court may entertain jurisdiction and proceed with the case as if the absent defendant had been served with process within the district. It is declared that what is done shall, as regards the absent defendant not appearing, "affect only the property which shall have been the subject of the suit and under the jurisdiction of the Court therein, within such district.

253. Do.—Defendant Not Personally Served May Have Decree Set Aside at any Time Within a Year of Its Entry.—There is a further proviso that any defendant not actually served as above provided may at any time within one year after final judgment in any such suit enter his appearance to it and thereupon the Court shall make an order setting aside the judgment and permitting him to plead, on payment of such costs as the Court shall deem just.

One Fernandez in the United States District Court for the District of Porto Rico brought suit against a certain Perez and other citizens and residents of Spain, to set aside certain mortgages and sales of real property in Porto Rico. Personal services was never had on Perez and an order of publication was issued. The order was published and due proof thereof made. The bill was thereupon taken as confessed against him. After further proceedings, all *ex parte*, the mortgages and sales were held to be void. The marshal was directed to sell the land under an execution upon the judgment held by the complainant. Within two months after the decree and before the property had been sold, Perez entered his appearance. He applied for leave to defend the suit on the ground that he had not been personally notified. It appeared that he actually had learned of the pendency of the proceedings. The Supreme Court said that the defendant had an absolute right to have the decree set aside at any time within twelve months after its entry upon applying so to do, provided he had not actual personal notice resulting from the service on him outside of the district of an order

of the Court directed to him and requiring him to appear and defend within a time stated.¹

254. Do.—Suits to Partition Lands and Remove Clouds.—The authority given by this section of the Code is one of much importance. Without it the Federal jurisdiction would be greatly restricted. It enables the United States Court to entertain partition suits when there is diversity of citizenship. For example—the plaintiff, who was a citizen of New Hampshire, claimed to be seized as tenant in common in fee simple and to be in actual possession of some 10,000 acres of land in the Northern District of Florida. Some of the defendants—130 in all—were citizens of Florida; other of Georgia, South Carolina, North Carolina, Alabama, Mississippi, Texas, Illinois, New York and New Jersey. The bill was to quiet title and for partition. It was held that this was a case of which the Court for the Northern District of Florida had jurisdiction and in which it might proceed by service of actual process or by publication, so as to bring in the absent defendants and bind their interests in the land in controversy.¹

255. Do.—Suits to Enforce Trusts.—The section is applicable to suits to enforce trusts in, and liens upon funds or property within the territorial jurisdiction of the Court. A citizen of a State other than either Indiana or New York filed a bill in the Circuit Court of the United States for the District Court of Indiana against the administrator of a decedent, claiming that a fund of \$150,000 in the hands of the administrator was subject to a trust for the payment of some \$31,000 to the complainant. The trustees were citizens of New York. The Supreme Court held that they were indispensable parties, but that the complainant could have them brought in by actual service of process or by publication in the manner prescribed in the statute.¹

¹ *Perez vs. Fernandez*, 220 U. S. 224.

¹ *Greeley vs. Lowe*, 155 U. S. 58.

¹ *Goodman vs. Niblack*, 102 U. S. 563.

256. Do.—Suits to Enforce Rights in Shares of Stock.

—It has been held that an action to enforce rights in shares of stock of a corporation whose legal habitation is within the district, is authorized by the section. It is a proceeding to remove a cloud from personal property.

In a case which went to the Supreme Court the plaintiffs were all stockholders in a Michigan mining company. They were citizens of States other than Michigan. They alleged that officers and directors of the corporation, some of whom were citizens of Michigan and some of Massachusetts, had fraudulently conspired together to cause the stock belonging to the plaintiffs to be sold for the non-payment of assessments alleged to have been fraudulently levied for the purpose of bringing about such sales. The plaintiffs said that they were the equitable owners of the stock, although the legal title was in certain of the defendants. The relief asked was a decree establishing their rightful title and ownership. The corporation was properly summoned. The individual defendants residing in Boston had process actually served upon them, but they neither appeared, answered, pleaded or demurred. The Circuit Court for the Northern District of Michigan thought that it was without jurisdiction and dismissed the bill. The Supreme Court reversed the decree below. It held, that by the statutes of Michigan, shares of stock were personal property. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by it within the State, whose creature it is, whenever it is sought by suit to determine who is the owner. The property represented by the shares of stock was held by the corporation and was held in Michigan.¹

257. Section 57 of Judicial Code Rather Strictly Construed.—The Federal Courts strictly construe the statutes conferring jurisdiction upon them. In the case of *Ladew vs.*

¹ *Jellenik vs. Huron Copper Mining Co.*, 177 U. S. 1.

Tennessee Copper Co.,¹ the Court refused to hold that the physical cloud of fumes and gases which was damaging plaintiff's property was such a cloud as could be dealt with under section 57 of the Federal Code.

A citizen of Florida, brought suit in the United States Court for the Eastern District of North Carolina against A, a resident of such district, and B, a resident of Tennessee. He charged that B had been his confidential agent; had induced him to buy land from A for a large sum of money and had pretended himself to pay one-twentieth of the purchase price. The fact was that B was acting as the agent of A. With A's knowledge and at A's procurement he had made to the plaintiff many false and material representations about the land. Plaintiff paid A \$38,000 for it and understood that B paid A \$2,000. The land was conveyed by A to the plaintiff, A undertaking to hold one-twentieth of it in trust for B. In point of fact, B never paid A anything. He received one-twentieth of it from A as a part of his commission for swindling the plaintiff. Plaintiff sought to rescind the sale and he made B a party to the suit for the purpose of removing the cloud raised by B's equitable title to the one-twentieth. The Circuit Court of Appeals for the Fourth Circuit held that the case made by the bill did not come under the provisions of section 57. The plaintiff was not trying to perfect or clear title to land; all that he asked was to get back his \$38,000.²

258. Suits for Infringement of Patents and Copyrights.—There are some other cases in which by express provision of the statute suit may be brought in other districts than those of the residence of the plaintiff or defendant. It will be worth while to mention a few of the more important of these. Suits, whether at law or in equity, for infringement of patents, may be brought in the district of which the defendant is an inhabitant, or in any district where the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regularly established place of business.¹ Proceedings under the copy-

¹ 218 U. S. 357.

² *Camp vs. Bonsal*, 203 Fed. 913.

¹ Judicial Code, sec. 48.

right statutes may be instituted in the district of which the defendant or his agent is an inhabitant or in which he may be found.²

259. Actions Under the Employer's Liability Act and Sherman Anti-Trust Act.—Actions under the Federal Employer's Liability Act may be brought in the district of the residence of the defendant, or in the district in which the cause of action arose, or in any district in which the defendant is doing business at the time such action is commenced.¹ Proceedings under the seventh section of the Sherman Anti-Trust Act may be brought in the district in which the defendant resides or in which he may be found.²

260. Actions on Bonds of Contractors for Public Improvements.—Since the Act of August 13, 1894,¹ persons entering into formal contracts with the United States for the doing of public work are required to give bond not only to protect the United States, but promptly to make payment to all persons supplying them with labor and materials in the prosecution of the work contracted for.

By the Act of February 24, 1905,² actions upon such bonds are required to be brought in the district in which the work was to be performed and not elsewhere.

No special provision has been made by statute for the service of process in the very numerous cases in which the defendants are residents of other districts. The Supreme Court has, however, said that the provision restricting the place of suit operates *pro tanto* to displace the provision upon that subject in the general jurisdiction act and amply authorizes the Court in the district wherein the action is required to be brought to obtain jurisdiction of the person of the defendants through the service upon them of its process in whatever district they may be found.³

¹ Act March 4, 1909, sec. 35; 35 Stat. 1084.

² 36 Stat. 291.

³ 26 Stat. 209.

¹ 28 Stat. 278.

² 33 Stat. 811.

³ United States vs. Congress Construction Co., 222 U. S. 199.

As it will be scarcely worth while to return to the subject of this Act, it will not be out of place to add that if the United States brings suit upon such bond those who have furnished labor or materials and have not been paid have the right to intervene in such case and to have their rights and claims adjudicated therein subject, however, to the priority and claim of the judgment of the United States. If there is not enough remaining after paying the United States to pay all other claims in full, what is left is distributed *pro rata* among the claimants. If the United States does not bring suit within six months after the final completion and settlement of the contract, any person who has supplied labor or materials for the prosecution of the work and has not been paid therefor may apply to the proper department under affidavit for a certified copy of the contract and bond, which will be furnished him. He may then sue in the name of the United States, but he must sue within one year after the final completion and settlement, so that such suits must be instituted, if at all, within a six-months period beginning six months after the final settlement under the contract. Only one action on a bond may be brought. All creditors entitled to its protection may intervene in that suit, provided they do so within a year after the final settlement. The statute requires that after the proceedings are instituted, in addition to formal notice to known creditors, there shall be given a general notice by advertisement once a week for three successive weeks, the last publication to be at least three months before the expiration of the time for intervention; that is to say, three months before the end of the year from the final settlement. It has been contended that it follows that the time in which any such suit can be brought is limited to a little over two months. It can not be begun until after six months from the settlement. It must be brought at least three months and three weeks before the expiration of a year from such settlement. The Circuit Court of Appeals for the Second Circuit holds such contention sound;⁴ that for the Third says it is not.⁵

⁴ Merchants National Bank vs. United States, 214 Fed. 200.

⁵ Vermont Marble Co. vs. National Surety Co., 213 Fed. 429.

CHAPTER X.

JURISDICTION OF FEDERAL COURTS AS
AFFECTED BY ASSIGNMENTS AND
TRANSFERS.

261. Introduction.—We have seen of what cases District Courts have jurisdiction and in what districts suits may be brought. We have thus far been dealing with proceedings which have been instituted by the original party to the contract or by the one actually injured by the tort, or by someone who succeeded by operation of law to his rights. Sometimes would-be plaintiffs would like to go into the Federal Court. They are citizens of the same State with the defendants, and have not the right to take their cases there. Under such circumstances they are tempted to transfer their claims to assignees who are citizens of another State.

262. General Jurisdictional Test in All Cases of Assignment — Sham Assignments Will Not Confer Jurisdiction.—Sometimes the assignment is a pure form. It is not made with intent to make the assignee the real owner of that which is assigned to him. In such cases, independent of any statutory provisions, the Courts will hold that they have no jurisdiction; the plaintiff has no interest in the subject-matter of the controversy.

A citizen of Pennsylvania, without consideration, made a conveyance of land to a citizen of Maryland. The latter, to accommodate the grantor, allowed his name to be used in the Federal Court as a plaintiff in an action of ejectment against another citizen of Pennsylvania. The Court held that the conveyance was entirely colorable and collusive, and therefore incapable of laying a foundation for jurisdiction.¹

Citizens of the District of Columbia wished to have certain litigation concerning land in which they were interested

¹ Maxwell's Lessee vs. Levy, 2 Dallas, 381.

prosecuted in the United States Court for the District of Maryland. They conveyed their interest in the lands to a citizen of that State. The conveyance was without consideration and the grantee was on the request of the grantors to reconvey to them. The complainant in the proceeding was a citizen of Delaware. The Supreme Court said:

“If the conveyance” * * * “had really transferred the interest” of the grantor to the grantee, “although made for the avowed purpose of enabling the Court to entertain jurisdiction of the case, it would have accomplished that purpose” * * * “But in point of fact that conveyance did not transfer the real interest of the grantors. It was made without consideration, with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the Court” * * * “The Court will not, under such circumstances, give effect to what is a fraud upon the Court, and is nothing more.”²

263. Do.—If Assignment Genuine, Motive Immaterial.—The Supreme Court said, it will be noted, that if the conveyance had been real, transferring the interest in the land to the grantee, it would have been immaterial what the motive of the grantor was.

A citizen of Alabama filed a bill in the United States Court for the District of Ohio, against certain citizens of the latter State, to compel them to convey to him certain land, which had been granted to him by a citizen of Ohio. The grantor feared that his title would not be sustained in the Ohio State Courts. He was indebted to the plaintiff in the sum of \$1,100. He offered to sell and convey the land to the latter in payment of this debt. He said that he thought the title was good; that it would most probably be established in the Courts of the United States, but would fail in those of the State. In his opinion the property was worth much more than the sum he was willing to take for it, but in consequence of the difficulties attending the title he would convey it in satisfaction of the debt. He offered to render any service in his power to the grantee in the

² *Barney vs. Baltimore City*, 6 Wall. 288.

prosecution of his claim in the Courts of the United States. The testimony showed a sale and conveyance binding on both parties. The title of the grantor was extinguished. The Supreme Court thought that the motives which induced him to make the contract, whether justifiable or censurable, could not affect its validity. It said: "The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States."¹ The jurisdiction was therefore upheld.

When one or the other of the parties to the controversy claims under a deed, grant or assignment from someone else, if the conveyance is a real conveyance by which the grantor parts with the property and the grantee gets it, then if the Court will have jurisdiction, if the grantee be a party to the suit, it will, except where statute otherwise directs, have jurisdiction although the motive for the transfer was the desire to have the case tried in the United States Court. On the other hand, if the grantor still remains the real owner, the Court will not have jurisdiction unless it would have were the grantor himself a party to the suit.

264. Special Statutory Jurisdictional Test as to Assigned Choses in Action—District Court Has No Jurisdiction Unless it Would Have, Had There Been No Assignment.—But Congress has never felt that it was wise to leave the law in this state.

There are many classes of contracts, nominal title to which can be transferred with facility. In many, if not most, cases it is impossible to determine whether the assignment was an actual transfer of the beneficial interests or was merely colorable. And, therefore, in the original Judiciary Act the first Congress provided, that except in cases of foreign bills of exchange, no District or Circuit Court should have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless the suit might have been prosecuted in such Court to recover the said contents if no assignment had been

¹ McDonald vs. Smalley, 1 Peters, 623.

made. With slight changes in phraseology, this provision has remained the law ever since. In the Judicial Code it forms a sentence of that same first paragraph of section 24, about which so much has been said. As there worded, it reads:—

“No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment had been made.”

265. At What Time Must Court Have Had Jurisdiction Had There Been No Assignment.—The Code provides that the assignee may not sue in a Federal Court unless suit could have been brought in that Court if no assignment had been made. As of what time does the statute here speak? Suppose a citizen of Maryland gives his promissory note to another citizen of the same State. The payee endorses it over to a citizen of Pennsylvania. After its endorsement and maturity, the payee moves to Delaware. The Pennsylvania holder brings suit against the Maryland maker in the United States Court for the District of Maryland. Has the Court jurisdiction? At the time suit was brought that Court would have had jurisdiction had no assignment been made, for the original payee was then a citizen of Delaware and competent to sue the maker in the Federal Court. Or does the restriction relate to the time when the assignment became effective? If it does, the Federal Court would have no jurisdiction because at that time both the maker and the payee were citizens of the same State. The law is settled that, if at the time the action was instituted, the assignor could have brought suit in the Federal Court, it is immaterial whether he could have done so when the assignment was made.¹

266. When There Have Been Several Successive Assignments, to Which Does the Statute Refer?—Suppose that a citizen of Maryland gives his promissory

¹ Emsheimer vs. New Orleans, 186 U. S. 33.

note to a citizen of Delaware. The citizen of Delaware endorses the note over to another citizen of Maryland. The endorser endorses it to a citizen of Pennsylvania, who endorses it over again to a citizen of New York. Can the citizen of New York sue the original maker in the Federal Courts? The original payee could have sued because he was of Delaware, and if the assignment referred to in the statute is the first assignment, suit could have been brought in the Federal Courts had no such assignment been made. On the other hand, the holder of the note at the time suit was instituted, traced his title to it through mesne assignment from a person incapable of suing in the Federal Courts, viz, the Maryland holder.

This question has been fully considered by the Circuit Court of Appeals for the Seventh Circuit.¹

It reached the conclusion that when there are a number of successive assignments, not more than two of them at the most need be taken into account; the statute has no reference to any which are intermediate between the first and the last. If the original payee and the immediate assignor of the plaintiff are both at the time suit brought competent to sue the maker in the Federal Courts, the jurisdiction of those Courts is not defeated by the fact that some intermediate assignor or endorser is not.

Suppose at the time suit brought the plaintiff is a citizen of another State than that of the maker. At that time the original payee might have sued the maker in the Federal Court. The plaintiff himself claims under an assignment made directly to him by an intermediate holder, who at the time suit is brought is not competent to sue the maker. Has a Federal Court jurisdiction of the case? The Court of Appeals for the Seventh Circuit in the opinion last cited did not find it necessary to decide that question and reserved it. The authorities are there reviewed.

All hold that unless the Federal Courts would at the time suit brought have had jurisdiction of an action between the original parties they will not have it as between the then

¹ Farr vs. Hobe-Peters Land Co., 188 Fed. 10.

holder and the maker; whether they will have it when the plaintiff's immediate assignee is one not competent to sue the maker in the Federal Courts, although the original payee could have done so, is still an open question.

267. What is a Chose in Action in the Statutory Sense?—Mortgages.—What do the words “chose in action” as here used mean? A citizen of Michigan owed money to a Michigan corporation. He gave his bond therefor and secured its payment by a mortgage on land. The mortgagee assigned the bond, the mortgage, the money secured, and the estate created to a citizen of New York. The latter subsequently filed a bill in the Circuit Court of the United States for the District of Michigan for the foreclosure of the mortgage. The Supreme Court said that the term

“‘chose in action’ is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action. It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel interest, while the mortgagor is treated as the true owner.” * * * “In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment.” * * * “The complainant in this case is the purchaser and assignee of a sum of money—a debt, a chose in action—not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore ‘the assignee of a chose in action’ within the letter and spirit of the Act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not.”¹

Later cases have qualified some of the language used. They have held that the statute does not apply to rights of action arising out of the ownership of an assigned chattel any more

¹ *Sheldon vs. Sill*, 8 How. 449.

than it does to those incident to the ownership of granted land.²

268. Do.—Contracts for the Conveyance of Lands.—

The School Fund Commissioners of Black Hawk County, Iowa, entered into contracts with a number of individuals, all citizens of Iowa, to convey to them some of the school lands of that county. Part of the purchase money was paid in cash and the balance was to be paid thereafter at times stipulated in the agreements. It was provided that if the subsequent payments were not forthcoming those previously made should be forfeited. Thereafter, the lands and all interests under these contracts were conveyed to the plaintiff, a citizen of New York. He filed a bill alleging a tender of the amount still due and praying that his title to the land might be cleared, and that all conveyances made in fraud of his rights might be cancelled. There was a very ingenious attempt so to frame the bill as to avoid all appearance of asking for the specific performance of the contract and to make it seem as if the real controversy was over the title to the land, but it was held that the Federal Court had no jurisdiction.¹

269. Do.—Is a Judgment for Tort a Chose in Action Within the Meaning of the Statute?—It is probable that a judgment for a tort is not a chose in action within the meaning of the statute, although it is clear that a judgment for breach of contract is.¹

In the last cited case the Supreme Court holds that where justice requires it, the Court will look back of the judgment to the cause for which it is given and be governed accordingly.

270. Right of Assignee to Sue as Affected by the Requirement of a Minimum Amount in Controversy.—Suppose a plaintiff claims as the assignee of a number of

² *Deshler vs. Dodge*, 16 How. 622.

¹ *Corbin vs. County of Black Hawk*, 105 U. S. 659.

¹ *Walker vs. Powers*, 104 U. S. 248.

separate payees? The holder, at the time suit brought, is himself a citizen of another State than that of the maker, as is also each one of the payees to whose rights he has succeeded. The aggregate of his claim exceeds \$3,000. No one of his assignees had a claim for so much. Would the Federal Court have jurisdiction? Although the suit could not have been brought had no assignment been made, the Supreme Court¹ has held that the statute has no application to such a case.

The provision that the United States Courts shall not have jurisdiction unless the amount in controversy exceeds a certain sum, is intended merely to prevent cases in which the amount involved is not large being brought in Courts in which as a rule litigation is more expensive than it is in the State tribunals. If when the case gets into Court the required amount is in controversy, the purpose of Congress has been attained.

271. Does the Assignment Statute Have Any Relation to the Venue of Actions?—Suppose A, a citizen of Maryland, gives his promissory note to B, a citizen of Pennsylvania, and B endorses the note over to C, a citizen of the Southern District of New York. A does not pay the note at maturity, is in New York and is there sued by C. Can he object to the jurisdiction on the ground that, if no assignment had been made he could not have been sued in that particular Court, because, if the note had remained in the hands of B, B could have sued on it only in the Eastern District of Pennsylvania, in which he lived, or in the District of Maryland, in which A lived?¹

The decided cases differ on the question. The earlier say that such a suit can be maintained. The later that it can not.

¹ *Emsheimer vs. New Orleans*, 186 U. S. 33.

¹ *Bolles vs. Lehigh Valley R. Co.*, 127 Fed. 884; *Consolidated Rubber Tire Co. vs. Ferguson*, 183 Fed. 756; *Waterman vs. C. & O. R. Co.*, 199 Fed. 667.

272. Exceptions — Foreign Bills of Exchange. —

From this assignment provision foreign bills of exchange are expressly excepted. What is a foreign bill of exchange?

In 1819 Finley & Van Lear of this city drew a bill of exchange in favor of one Rosewell L. Colt, also of Baltimore, on Stephen Dever of New Orleans. The payee endorsed the bill for value to one Buckner, a citizen of New York. It was not paid at maturity and was properly protested. Suit was brought on it by Buckner as a citizen of New York against Finley & Van Lear as citizens of Maryland in the United States Circuit Court for the District of Maryland. It was contended on one side that the bill in question was not a foreign bill of exchange; that in order that it should be, it would necessarily have had to have been drawn by persons residing abroad, but the Supreme Court was of a different opinion. It held that bills of exchange drawn in one State of the Union on persons living in another, partake of the character of foreign bills and ought to be so treated in the Courts of the United States.¹

The reason for this exception was discussed by the Supreme Court in that case. It was there suggested that the purpose of the assignment statute was

“to prevent frauds upon the jurisdiction of the” Federal Courts, “by pretended assignments of bonds, notes and bills of exchange, strictly inland; and as these evidences of debt generally concern the internal negotiation of the inhabitants of the same State, and would seldom find their way fairly into the hands of persons residing in another State, the prohibition as to them would impose a very trifling restriction, if any, upon the commercial intercourse of the different States with each other. It is quite otherwise as to the bills drawn in one State upon another. They answer all the purposes of remittances, and of commercial facilities, equally with bills drawn upon other countries, or *vice versa*; and if a choice of jurisdiction be important to the credit of bills of the latter class, which it undoubtedly is, it must be equally so, to that of the former. Nor does the reason for restraining the transfer of other choses in action, apply

¹ Buckner vs. Finley & Van Lear, 2 Peters, 586.

to bills of exchange of this description; which, from their commercial character, might be expected to pass fairly into the hands of persons residing in the different States of the Union."

273. Do.—Instruments Payable to Bearer Made by a Corporation Also Excepted From Assignment Proviso.

—The provision prohibiting suits by assignees unless the suit could have been brought had no assignment been made, is expressly made applicable to instruments payable to bearer, with the exception of such as are made by corporations.

The City of New Orleans issued a number of certificates of indebtedness payable to bearer. One Quinlan, a citizen of New York, brought suit in the United States Court for the Eastern District of Louisiana against the City of New Orleans. The declaration contained no averment that the suit could have been maintained by the assignors of the certificates sued upon. The Supreme Court said that was immaterial; that the certificates were payable to bearer, they were made by a corporation; "they were transferrable by delivery; they were not negotiable under the law merchant, but that was immaterial; they were payable to any person holding them in good faith, not by virtue of any assignment of the promisee, but by an original and direct promise, moving from maker to the bearer." It was, therefore, held that they were not subject to the assignment restrictions and that the Circuit Court had jurisdiction.¹

274. When in the Sense of the Statute Does the Assignee Sue to Recover Upon a Chose in Action?—The Suit Must Be Brought Upon the Chose in Action.—

The recovery of the contents of the assigned chose in action must be the object of the suit; otherwise the statute does not apply. The tax collector of Cuyahoga County, Ohio, distrained upon some of the banks of that county. He seized certain bank notes in their possession. He said the banks owed taxes and he took the notes because the taxes were due

¹ New Orleans vs. Quinlan, 173 U. S. 191.

and to pay the taxes with them. The banks thereupon sold those very notes to a citizen of New York. The latter, in the Circuit Court of the United States for the Northern District of Ohio, brought an action of replevin against the tax collector, who, of course, was an Ohio citizen. The Supreme Court, five judges against four, said:—

“We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned. In the case of a tortious taking, or wrongful detention of a chose in action against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury. The distinction, as it respects the application of the 11th section of the Judiciary Act to a suit concerning a chose in action in this — where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the Court, if no assignment had been made; but if brought for a tortious taking or a wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.”¹

275. Do.—The Assigned Chose in Action Must Be the Cause of Action.—In order that this proviso of the statute shall apply, there must have been something assigned, and that something must constitute the cause of action.

Citizens of New York sued citizens of Oregon as makers of a promissory note. On its face, it was payable to another citizen of Oregon and was endorsed by him. The plaintiffs in their declaration alleged that the transaction was a loan by them to the endorser; that the defendants executed the note for the accommodation of the endorser to enable him to pro-

¹ Deshler vs. Dodge, 16 How. 630.

cure the loan, and that he was in fact the maker of the notes and never himself had any cause of action thereon against the defendants. The Supreme Court affirmed a judgment in favor of the plaintiffs. It said:—

“The plaintiffs below were the first and only holders of the note for value.” * * * “It is quite plain that the plaintiffs’ action did not offend the spirit and purpose of this section of the Act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Court.” * * * “The true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promissor, and did not, by his endorsement, assign or transfer any right of action held by him against the accommodation makers.”¹

276. Do.—Suits by Drawers Against Acceptors Are Not.—A municipal corporation of Nebraska contracted with citizens of that State for the construction of waterworks. The contractors gave certain citizens of Missouri an order upon the city for \$5,750. The municipality accepted the order and undertook to withhold its amount from the final payment that might become due the contractors. The city was sued by the holders of the order. The Supreme Court said:—

“This acceptance was a contract directly between the city and the plaintiffs below, upon which the city was immediately chargeable as promissor to the plaintiffs. Nothing is better settled in the law of commercial paper than that the acceptance of a draft or order in favor of a certain payee, constitutes a new contract between the acceptor and such payee, and that the latter may bring suit upon it without tracing title from the drawer. From the moment of acceptance, the acceptor becomes the primary debtor, and the drawer is only contingently liable, in case of non-payment by the acceptor.” * * * “It has been the settled law of this Court that the Circuit Court

¹ Holmes vs. Goldsmith, 147 U. S. 150.

has jurisdiction of a suit, brought by the endorsee of a promissory note against his immediate endorser, whether a suit would lie against the maker or not, upon the ground, as stated by CHIEF JUSTICE MARSHALL, 'that the endorsee does not claim through an assignment. It is a new contract entered into by the endorser and endorsee.' ”¹

277. Do.—Suits by Endorsees Against Endorsers Are Not.—The case referred to in the opinion of the Supreme Court last cited was a case in which citizens of Pennsylvania in the United States Circuit Court for the District of Tennessee sued a citizen of Tennessee as the endorser of a promissory note drawn by another citizen of Tennessee and endorsed to the plaintiffs.¹

278. Do.—Suits by Those Claiming Under Subrogation Are Not.—Subrogation is not assignment. The subrogated creditor, by operation of law represents the persons to whose rights he is subrogated. The administrator of that famous litigant, Mrs. Gaines, brought suit in the United States Court against the City of New Orleans. He claimed to be subrogated to the rights of certain citizens of Louisiana. It was held that the United States Court had jurisdiction on the ground of diverse citizenship, the administrator being a citizen of another State than Louisiana, although the persons to whose rights he was subrogated were citizens of Louisiana. The Court said:—

“We have repeatedly held that representatives may stand upon their own citizenship in the Federal Courts, irrespectively of the citizenship of the persons whom they represent, — such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle. When, how-

¹ Superior City vs. Ripley, 138 U. S. 96.

¹ Young vs. Bryan, 6 Wheat. 146.

ever, the State or the Governor of a State, is a mere figurehead or nominal party in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on a question of citizenship."¹

279. Do.—Suits Upon Novations Are Not.—Citizens of Illinois entered into a contract of employment with an Illinois corporation and assumed certain obligations in connection therewith. The Illinois corporation sold all its property, including such contracts, to a New Jersey corporation. The defendants, with knowledge of the sale, remained in the service of the purchaser in the same capacities and with the same salaries. Subsequently it sued them for breach of the contract of employment. The Supreme Court held that the rights of the New Jersey corporation and of the defendants depended not upon the original contract, but upon its adoption by the New Jersey corporation and the defendants as the contract between them; and that therefore the New Jersey corporation was not assignee of the rights of the Illinois corporation under the contract, but was an original contracting party with the Illinois defendants.¹ The Federal Court had jurisdiction.

280. Do.—Suits by Lessors Against Assignees of Lessees Are Not.—A citizen of one State brought suit against a citizen of another on the covenants contained in a lease made by the plaintiff to an assignor of the defendant. In the declaration the plaintiff did not allege the citizenship of the original lessee. The Court held that his citizenship was immaterial; that the statute only applied to the assignee of the right of action, and had no reference to interests in specific things acquired by the defendant by assignment; such interests and the rights resulting from them were within neither the purpose nor the letter of the statute.¹

¹ *New Orleans vs. Gaines, Admr.*, 138 U. S. 606; affirmed in *Mexican Central Railway Co. vs. Eckman*, 187 U. S. 429.

¹ *American Colortype Co. vs. Continental Co.*, 188 U. S. 104.

Adams vs. Shirk, 105 Fed. 659.

281. Do.—Suits by Party to Contract Against Assignee of Other Are Not.—A contract was made between two citizens of Florida. One of them assigned his rights under the contract to citizens of France. The other subsequently brought suit against those citizens of France in the United States Court. It was held that independently of the question whether there had not been necessarily a novation upon which the plaintiff was suing, the assignment statute had no application to an assignment made by an assignee of the defendant and not by an assignee of the plaintiff.¹

282. Do.—Suits for Trespass to Property Are Not.—The statute relates solely to such suits as grow out of the contracts of the original parties. It has no reference to actions brought to recover damages for trespass to property.

A plaintiff, a citizen of New York, brought an action in his own right and as assignee of another, whose citizenship was not stated, against citizens of Florida, to recover as damages \$6,000, the alleged value of 3,000 trees and pine logs cut by the defendants upon the lands in Florida of the plaintiff and one Russell, and carried away and converted to the use of the defendants. Russell had assigned all his interests in the logs and in the claim to the plaintiff. The Supreme Court held that the suit could be maintained and that the statute did not apply to claims of that character.¹

283. Duty of Court to Dismiss Suits Not Involving a Controversy Within Its Jurisdiction.—Congress and the Courts are zealous to prevent the bringing in the United States Courts of suits of which those Courts would not have had jurisdiction had the real facts been set forth by the plaintiff. The Judicial Code provides:—

“If in any suit commenced in a District Court, or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really

¹ Brooks vs. Laurent, 98 Fed. 647.

¹ Ambler vs. Eppinger, 137 U. S. 480.

and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.”¹

284. Do.—History of the Statutory Provision.—

The history of this section and the reasons for it have been fully stated by the Supreme Court of the United States.¹ Under the Act of 1789, as it originally stood, because of the then commercial and industrial conditions of the country, there were, apparently, not very many cases of colorable transfers for the purpose of giving jurisdiction. As we have seen, it was uniformly held that if the transfer was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or grantee could sue in the Courts of the United States when his assignor or grantor could not, except, of course, in that very large class of cases in which the statute provided that the assignee could not sue unless the original party to the contract could have.

“But it was equally well settled that if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for purposes of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by their citizenship rather than that of the nominal plaintiff.”

¹ Sec. 37, Judicial Code.

¹ Farmington vs. Pillsbury, 114 U. S. 141.

Under the Act of 1789, it early became the law that if jurisdiction was shown on the face of the plaintiff's pleading, the defendant could attack the truth of the jurisdictional allegations only by a plea in abatement, and that such plea, in accordance with the general rule governing pleas of that character, must be filed before the filing of a plea to the merits. The Act of 1875 largely extended the jurisdiction of the United States Courts over a class of cases in which it was exceedingly easy to make colorable transfers under such circumstances that it would be difficult for the defendant to know the facts sufficiently early to plead them in abatement. This provision of the statute as to collusive assignment was therefore incorporated in the Act. It was carried forward into the Act of 1888, although the purpose and effect of the latter statute was to restrict the jurisdiction of the United States Courts. The Supreme Court said:—

“it does not, any more than did the Act of 1789, prevent the courts from taking jurisdiction of suits by an assignee when the assignment is not fictitious, and actually conveys all the interest of the assignor in the thing assigned, so that the suit when begun involves really and substantially a dispute or controversy in favor of the assignee for himself and on his account against the defendant; but it does in positive language provide that, if the assignment is collusive and for the purpose of enabling the assignee to sue in the courts of the United States for the benefit of the assignor, when the assignor himself could not bring the action, the court shall not proceed in the case.”¹

285. Do.—Application of the Statutory Provisions to Concrete Cases.—A citizen of Indiana brought suit in the United States Court against a Michigan township on certain negotiable bonds for \$100 each, payable to bearer. He owned only three of them. Three more had been assigned to him for purposes of collection only by one Toban, whose citizenship was not disclosed. The rest of those sued on had been transferred to him for like purposes by certain citizens of Michigan. At that time the statute required that the

¹ Farmington vs. Pillsbury, 114 U. S. 141.

amount in controversy should be upwards of \$500. The Court gave judgment for the plaintiff for the amount due on the bonds belonging to him, and on those owned by Toban and for the defendant on the others. He carried the case to the Supreme Court. It was there held that the Court below should have dismissed the suit. It was true that the defendant had not appealed, but the plaintiff had, and the case was still before the Court. It had been brought contrary to the provisions of the Act; the judgment was reversed and the suit dismissed.¹

In the case of *Farmington vs. Pillsbury*,² already referred to, certain citizens of Maine transferred overdue coupons, detached from the bonds of a Maine municipal corporation held by them, to a citizen of Massachusetts, who gave them a promissory note for \$500. The face value of the coupons was nearly \$8,000. The promissory note was payable two years after date. He made an agreement with them that he would give them 50% of the net amount he could collect upon the coupons. Nearly two years before the suit was brought the highest Court of Maine had decided that the bonds were void. The Supreme Court held that under all the circumstances it was apparent that the transfer was purely collusive and only for the purpose of giving jurisdiction.³

There was a case in which Sacramento County, California, was very much interested. It arose out of the fouling of one of the California rivers by the debris thrown into it by certain processes of hydraulic mining. For some reason the county preferred to have the case determined in the United States rather than in the State Courts. It accordingly arranged with an alien who owned land along the river to bring the suit in his name. It guaranteed that it would furnish the lawyers and pay all the expenses, and he promised not to compromise, settle or dismiss the case without its consent. The Supreme Court held that from the very beginning the

¹ *Williams vs. Nottawa*, 104 U. S. 209.

² 114 U. S. 141.

³ *Farmington vs. Pillsbury*, 114 U. S. 141.

suit was in reality the suit of the county with a party plaintiff collusively made for the purpose of creating a case cognizable by the Circuit Court of the United States. While, therefore, the dispute or controversy involved was nominally between an alien and the defendants, citizens of California, it was really and substantially between one of the counties of California and citizens of that State, and was not properly within the jurisdiction of the Circuit Court.⁴

286. Do.—Plaintiff's Alignment of Parties Does Not Bind the Court.—In a chancery suit it is often possible properly to make a particular person either a plaintiff or a defendant. Ordinarily under the flexible rules governing the giving of equitable relief it may not make much difference whether the particular person appears on one side or upon the other. When the jurisdiction of a Federal Court on the ground of diversity of citizenship is involved, the alignment of the parties on the respective sides of the controversy may be of great moment, because, as we have seen, those Courts may not entertain the suit on such grounds unless every plaintiff is of diverse citizenship from any defendant.

A plaintiff who wishes to bring his suit in the Federal Court will have every motive so to arrange the parties that there shall not be citizens of the same State on opposite sides. His action in this matter is not now binding upon the Court. Prior to the passage of the Act of 1875 it was.¹

Since then the Court will re-align the parties for itself, whenever justice requires it. A defendant who is really on the same side as the plaintiff will be put there, although the result is to defeat the jurisdiction.

287. Do.—Suits by a Stockholder Against a Corporation and Others.—A Court of Equity has jurisdiction to

⁴Cashman vs. Amador & Sacramento Canal Co., 118 U. S. 58.

¹Removal Cases, 100 U. S. 457.

prevent a threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits.¹

A stockholder may under this doctrine wish to test in the United States Court the validity of some statute, which he thinks injurious to the corporation. He accordingly makes the corporation one of the defendants and joins on the same side all the officials and other parties who are citizens of that State.

Such, for example, was a bill filed by a citizen of New York, a stockholder in a California corporation, against that corporation, its directors and the City of Oakland. The complaint stated that the city claimed the right to have water furnished it free for all municipal purposes; that it had no such right, but the corporation and its directors had furnished water free, and, despite the protests of the stockholders, proposed to continue so to do.²

Another is a case in which an Alabama stockholder in an Illinois gas company filed a bill against the company and the City of Quincy, alleging that the City of Quincy owed the company large sums for gas and would not pay them, and the corporation, though urged by the stockholders, would not bring suit.³

288. Do.—How Collusion is Sought to Be Prevented in Suits by a Stockholder Against a Corporation and Others.—Cases frequently arise in which a stockholder plaintiff makes both the corporation and other parties residing in the same State as that from which the corporation has its charter, defendants, and in which the relief sought by the plaintiff would clearly benefit the corporation.¹

A corporation will be held to be opposed to the plaintiff stockholder whenever the person controlling it are in fact antagonistic to the relief for which he asks.²

¹ Pollock vs. Farmers Loan & Trust Co., 157 U. S. 553.

² Hawes vs. Oakland, 104 U. S. 450.

³ Quincy vs. Steel, 120 U. S. 241.

¹ Pittsburgh C. & St. L. Ry. Co. vs. Baltimore & O. R. Co., 61 Fed. 705.

² Street's Federal Equity Practice, sec. 562.

A citizen of New York, a stockholder in a Massachusetts corporation, filed a bill against it, its directors, another corporation, and the City of Boston, alleging that the State Legislature and the City of Boston had attempted to repeal its charter and to grant its property to the other corporation; that its directors had refused to bring any action in the State Courts, and that he was remediless except in equity. The Supreme Court held that this bill presented "so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers" that "we think complainant as a stockholder comes within the rule laid down in" *Hawes vs. Oakland*, "which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter."³

On the other hand, when the officers of the corporation are in fact in sympathy with the stockholder, the Federal Courts will re-align the parties so as to put the plaintiff and the corporation on the same side, and by so doing will usually oust their jurisdiction.

289. Do.—Equity Rule 27.—In *Hawes vs. Oakland* (*supra*) certain rules to prevent collusive suits of this character were laid down. They are now substantially embodied in Equity Rule 27, which provides that every bill brought by a stockholder in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The bill must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the causes of his failure

³ *Greenwood vs. Fruit Co.* 105 U. S. 16.

to obtain such action, or the reasons for not making such effort. Most of the requirements of this rule speak for themselves.

A corporation has some controversy with the municipality in which it is doing business. All the stockholders are citizens of the same State, or if there are any who reside elsewhere they are not willing to bring suit. It is highly inexpedient that it shall be in the power of some resident of another State to buy a few shares of stock in the corporation for the very purpose of promoting litigation.

290. Do.—Removal to Federal Courts Cannot Be Prevented by False Alignment of Parties by State Court Plaintiff.—The plaintiff, instead of desiring to bring his case in a Federal Court, may wish to keep it out of that Court, and to defeat the right of removal thereto which may sometimes be exercised by a defendant. Under such circumstances he may in the State Court unite as a defendant one who is a citizen of the same State with himself.

A Kansas mortgagor wished to contest the validity of a mortgage previously made by him to a Missouri corporation. He had strong reasons to wish that the litigation should be carried on in the State and not in the Federal Courts. He accordingly made a new or second mortgage to another citizen of Kansas. The debt secured by this second mortgage was made payable in ten days. At the end of that time the second mortgagee filed in the State Court a bill to foreclose and for other relief against the mortgagor and the first mortgagee. The relief asked against the latter was a declaration of the invalidity of its mortgage.

It will be perceived that as the holder of the second mortgage was the plaintiff and the mortgagor was a defendant, there was a citizen of Kansas on each side of the record. The first mortgagee sought to remove the case to the Federal Court. The Circuit Court of Appeals for the Eighth Circuit held that the cause was removable. In the real controversy

the mortgagor and the second mortgagee were on one and the same side, the first mortgagee on the other.¹

291. When Objection to the Jurisdiction Should Be Taken.—While the objection that there is no jurisdiction may be raised at any time by the Court itself, if one of the parties wishes to make it he should do so as early in the proceedings as he has notice of the facts upon which it is supposed to rest. Delay in making the objection will, if the existence of those facts is in doubt, weigh in the mind of the Court against sustaining it.

292. Necessary Allegations in Suits by Assignees.—In suits in the Federal Court by an assignee upon a chose in action, it is necessary that the declaration or complaint shall set forth, on its face, such facts as will show affirmatively that the Court would have had jurisdiction of the suit had no assignment been made.¹

¹ *Boatmen's Bank vs. Fritzlen*, 135 Fed. 650.

¹ *Turner vs. Bank of North America*, 4 Dallas, 8.

CHAPTER XI.

REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.

293. Introductory.—The jurisdiction given to the District Courts by section 24 of the Judicial Code is for the greater part not exclusive, but is concurrent with the Courts of the States;¹ that is to say, the plaintiff has the option of bringing his suit either in a State or in a Federal Court.

294. Why Removal is Permitted.—A defendant may be as much exposed to the dangers of local prejudice as a plaintiff. He may be as much interested in setting up the Federal view of some right claimed under the Constitution and laws of the United States. If he is compelled to remain in the Court into which the plaintiff brought him, he has no such choice between the State and the Federal tribunals as was exercised by his adversary. If opportunity is afforded him of removing to a Court of the United States, cases in which Federal questions are involved, or in which diversity of citizenship exists, he will stand on an equal footing with his opponent.

In some cases removal statutes give him this option; in others, in which it would seem to be as necessary to the protection of his interests, it is withheld, either because of the manifest intent of the law-makers or because of the somewhat narrow construction the Courts have put upon the language of the statutes.

There are sound reasons for carefully restricting the jurisdiction which may be exercised by the Federal Courts over litigation between individuals. It is to be regretted that many of the limitations imposed are of so arbitrary a character. This is especially true with reference to those which

¹ Chap. V, *supra*.

hedge about the right of removal from State to Federal tribunals.

Whether a case is or is not removable, often depends upon incidental or accidental circumstances having little discoverable bearing upon anything of real moment.

295. Rules Regulating Removals—Ordinarily No Suit Can Be Removed Unless it Could Have Been Brought Originally in the District Court.—The statutory provisions governing removals of cases from State to Federal Courts will be found in sections 28 to 39, both inclusive, of the Judicial Code. Section 28 provides that “any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title * * * brought in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district.”

Under this provision no suit can be removed unless it might have been brought in the District Court in the first instance.

296. Right of Removal Because Federal Question Involved—Existence of Such Question Must Be Shown By Plaintiff's Statement of His Own Case.—Where jurisdiction is based on the existence of a Federal question the right of removal does not in anywise depend on diversity of citizenship. Such a suit may be brought in the District Court, although all the parties to it are citizens of the same State. The District Court has no jurisdiction on the ground that there is a Federal question involved, unless the plaintiff's statement of his own case raises it.¹ It is not sufficient for him to allege what the defendant's defense will be. The Courts have held that it follows that where the plaintiff's declaration or bill does not disclose the existence of a Federal

¹ Sec. 174, *supra*.

question, the defendant cannot remove, however much his defense may in fact turn upon it.

The State of Tennessee, in one of its Chancery Courts, sued the Union & Planters Bank for taxes. The bank said that by an irrevocable contract, the State had exempted it from taxation, and alleged that the statutes by which taxes were imposed upon it, impaired the obligation of this contract and were null and void. The sole issue in the case was this Federal question, but as the State's bill was founded entirely upon its own laws, the Supreme Court held that the defendant could not remove the case to the United States Court.²

There is one exception to this rule. A corporation created by the United States when made a defendant in a State Court, may, if the Federal incorporation is not stated in the plaintiff's pleading, set up the fact in its petition and demand a removal.³

To say, as does the statute, that a suit which could originally be brought may be removed, is easy—far easier, perhaps, than it would be in any other way, to describe cases which Congress is willing to have removed from the State to the Federal Courts. Nevertheless, such simple form of statement has its disadvantages. It makes irremovable cases which it is impossible to distinguish for any practical reason from some of those which are removable. For example, if a plaintiff may bring his case into the Federal Court because it rests upon a claim of right under the Constitution, laws or treaties of the United States, why should not a defendant, who bases his defenses on rights given him by the same enactments, be equally entitled to have that case tried out in the Federal Court? There is no answer except that Congress has not allowed him to do so.

297. Cases Which Are Not Removable Although They Involve a Federal Question—Under the Employer's Liability Act.—There are cases which, though they involve a Federal question and may be brought in the District Court,

² *Tennessee vs. Union & Planters' Bank*, 152 U. S. 454.

³ *Texas & Pacific R. R. Co. vs. Cody*, 166 U. S. 606.

cannot, if originally instituted in a State Court, be removed to a Federal.

The District Courts have concurrent jurisdiction with the Courts of the States over suits brought by railroad employees against a railroad company engaged in interstate commerce for injuries received by them while employed in such commerce.¹ Congress has expressly declared that when such suit has been instituted in any State Court of competent jurisdiction it may not be removed into the Federal Court.²

It makes no difference that the right of removal would exist independently of the nature of the case—as, for example, that the plaintiff and the defendant are citizens of different States. If it arises under the Employer's Liability Act and is first brought in a State Court it cannot be removed at all.³

298. Do.—Against Common Carriers to Recover Damages for Delay, Loss of, or Injury to, Property Unless Upwards of \$3,000 in Controversy.—Another statute provides that suits brought in State Courts against common carriers to recover damages for delay, loss of, or injury to, property received for transportation by such common carriers under various Acts to regulate commerce, shall not be removable into the United States Court, unless the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.¹

299. Do.—Suits Against Receivers Appointed By Federal Courts.—A suit by or against a receiver appointed by a Federal Court is ancillary to the administration of the estate in his hands. It may for reasons stated in the next chapter be brought in the Court whose officer he is, no matter what the citizenship of the parties, the nature of the issues or the amount in controversy may be.

¹ Sec. 193, *supra*.

² Proviso at end of sec. 28, Judicial Code.

³ *Stafford vs. Norfolk & Western Ry. Co.*, 202 Fed. 605.

¹ Act of Jan. 29, 1914.

Apart from statute, a receiver may not be sued without the consent of the Court which appointed him. Prior to the Act of March 3, 1887,¹ as amended by that of August 3, 1888,² the Federal Courts rigidly enforced this rule. Some hardships resulted. The Courts of the United States were from time to time called upon to appoint receivers for large corporations, some of which operated great railway systems, extending into many States. Usually the receivers continued the business of the insolvent concern. Their employees negligently injured others. Disputes arose as to the meaning or as to the performance of some of the countless agreements they made in the course of their daily operations. Many persons who had, or who thought they had, causes of action against them, greatly disliked being forced to seek, in a relatively distant Federal Court, recovery of what was often a trifling sum. Congress, accordingly, in the third section of the Act mentioned, declared that every receiver or manager of any property appointed by any Court of the United States may be sued, in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the Court in which he is appointed.

In some of the cases decided shortly after the passage of these Acts, language was used which intimated that a suit against a Federal receiver was a suit arising under the laws of the United States, and as such removable into the Federal Courts whenever a sufficient amount was in controversy. Subsequent cases, however, have said that such statements were inadvertent and unsound.³ It follows that if a case be brought against such a receiver in a State Court and his authority as receiver or the validity of his appointment as such is not drawn in question, the case is not one arising under the laws of the United States and cannot therefore be removed by the defendant on that ground to the Federal Courts, although it might have been brought originally in those Courts had the plaintiff so wished. There is,

¹ 24 Stat. 552.

² 25 Stat. 433.

³ *Gableman vs. Peoria, etc., R'way Co.*, 179 U. S. 335.

however, no statutory prohibition of the removal of such suits when there is a sufficient amount in controversy and some other Federal question is involved, or diversity of citizenship exists.

300. Suits in Equity Permitted By State Practice Where in 1789 Relief Must Have Been Sought at Law, Are Not Removable.—In many States, a creditor who has not reduced his claim to judgment may file a bill to vacate as fraudulent his debtor's conveyance of property. Such a suit, when instituted in a State Court, cannot be removed into a Federal, because the latter as a Court of Equity can not entertain it.¹ The case cited shows this principle to have been well settled.

The new equity rules, as we shall subsequently see, permit the Court to transfer to the law docket a suit in equity, the issues in which it finds to be essentially legal. Such suit when so transferred is proceeded with as an action at law. Whether the practical effect of this rule will somewhat modify the doctrine of *Cates vs. Allen* is an interesting question, upon which the Courts will doubtless soon be called to pass.

301. Removal on the Ground of Diversity of Citizenship.—Section 28 provides that any suit, other than one arising under the Constitution, laws or treaties of the United States of which the District Courts of the United States are given jurisdiction, and which is first brought in a State Court, may be removed into the District Court of the United States for the proper district by the defendant or defendants, being non-residents of the State.

A defendant who is sued in his own State Court by a resident of another State has no right under the present statutes to remove his case into the Federal Court. It is true that there is a controversy between citizens of different States, the determination of which is within the constitutional grant of judicial power to the United States, but this

¹ *Cates vs. Allen*, 149 U. S. 451.

is one of the many grants of which Congress does not at present see fit to avail itself. Under ordinary circumstances, there is no reason why it should. A resident of a particular State ought not to fear that its Courts will be prejudiced against him and in favor of someone who lives elsewhere.

302. Do.—When Suit Brought and Removal Sought.

—A defendant is not entitled to have a case removed on the ground that there is diversity of citizenship between him and the plaintiff unless such diversity existed both at the time the suit was brought and at the time the removal was asked for.¹

303. Do.—Owner of Property Sought to Be Condemned is Treated as Defendant.—In some States when a condemnation proceeding is carried into Court the owner of the property sought to be condemned is treated as the plaintiff. This practice does not make him such within the meaning and purpose of the Removal Acts. As the condemnation proceedings have been instituted against him, the Federal Courts will treat him as the defendant. As such, he may remove the case, if he be a non-resident and the amount in controversy is sufficient.¹

304. Right of Removal in Cases Between Citizens and Aliens—An Alien Defendant May Remove His Case Whether the Plaintiff Be or Be Not a Resident of the District.—It has been contended that an alien, individual or corporate, who is sued in a State Court by a plaintiff who does not reside in the Federal district in which the suit is brought, may not remove the case to the United States Court, but that contention has been held unfounded.¹

305. Do.—May a Defendant Who is Sued By An Alien in a State Court of a District of Which Such Defendant is a Non-Resident Remove His Case?—On

¹ *Sterens vs. Nichols*, 130 U. S. 230.

¹ *Mason City & Fort Dodge R. R. Co. vs. Boynton*, 204 U. S. 570.

¹ *Wind River Lumber Co. vs. Frankfort Ins. Co.*, 196 Fed. 340.

general principles there would seem to be no reason why a defendant who is sued by an alien in a State Court of a district in which he does not live, should not have the right to remove his case to the Federal Court. There are decisions that he may. Most of the cases, however, take the other view, on the ground that as the alien could not have sued the defendant in the United States Court of any other district than that in which the defendant lived and could not therefore have sued originally in the United States Court to which removal is sought, the defendant may not remove it there. The whole question is elaborately discussed in *Western Union Telegraph Co. vs. Louisville & N. R. Co.*¹

306. Right of Removal of Cases Involving Separable Controversies.—The general purpose of the removal statutes, as has already been pointed out, is to put the defendant on an equal footing with the plaintiff as to the choice of Courts. This result is, by no means, as fully attained in practice now as it was before the Acts of 1887 and 1888. Nevertheless, that is the theory which underlies all the provisions for removals. We have already seen that a plaintiff, if he wishes to bring his suit in the Federal Court, may avoid ousting the jurisdiction of the Court by refusing to join as defendants those who, under the ordinary equity rule, would be necessary parties, but who, from the standpoint of absolute justice, are not strictly indispensable.

307. Do.—Under Acts of July 27, 1866.—While from a relatively early period it was recognized that the plaintiff might do so, it was not until the Act of July 27, 1866,¹ that a corresponding privilege was given to the defendant. Before that time, a suit could be removed only in the event that every party plaintiff to it, as originally brought, was a citizen of a different State from any of the defendants. By that Act it was provided that if the suit, so far as it relates to a defendant who is a citizen of a State other than that in which it

¹ 201 Fed. 939.

¹ 14 Stat. 306.

is brought, is such that there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, he should have the right to remove. It was held that under the Act what was removed to the Federal Court was only such part of the dispute as concerned the particular defendant who had applied for the removal.

After its amendment the Supreme Court said:—

“Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former Act permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable, parties. Rather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal Court.”²

308. Do.—Under Act of March 3, 1875.—The determination alluded to by the Supreme Court was evidenced by the Act of 1875, which contained the language now found in section 28 of the Judicial Code.

309. Do.—Whole Case Now Removed.—The Act of 1875 came before the Supreme Court in the case of *Barney vs. Latham*, already cited. That suit had been brought in a State Court of Minnesota by plaintiffs who were citizens respectively of Minnesota and Indiana. There were in all ten defendants. Nine of them were individual citizens of different States other than Minnesota or Indiana. The tenth was a Minnesota corporation. The individual defendants sought to remove the case to the United States Court. The removal was made and a petition to remand was denied.

² *Barney vs. Latham*, 103 U. S. 205.

The Supreme Court held that there was a controversy which could be decided between the individual plaintiffs and the individual defendants, and that therefore the latter had the right to remove the case, but the effect of such removal was to carry over the entire cause, including such part of the controversy as concerned the Minnesota corporation only.¹

310. Do.—Right of Removal Restricted by Construction.—The Federal Courts have by construction, restricted rather than enlarged the classes of cases in which the right of removal can be exercised on the ground that there is a separable controversy. Since the passage of the Act of 1887, they have steadily sought to limit rather than to extend their jurisdiction. The separable controversy must be one which is wholly between citizens of different States. If an alien is a party the case is not removable.¹

311. Do.—What Controversies Are Separable.—The Supreme Court has said “a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other,” is a separable controversy and nothing else is. “To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.”¹

An example of a case held to include a separable controversy was where stockholders of a corporation brought suit against it and its directors and also against another corpo-

¹ Connell vs. Smiley, 156 U. S. 336.

¹ King vs. Cornell, 106 U. S. 395; Creagh vs. Equitable Life Assur. Soc., 88 Fed. 1.

¹ Fraser vs. Jennison, 106 U. S. 191.

ration to whom it had conveyed its property. The bill sought to set aside the conveyance as *ultra vires* and as in fraud of complainant's rights and to compel the directors to respond in damages. It was held that the latter were not necessary parties to the relief sought against the corporations. The controversy as to them was separable. They had a right to remove.²

312. Do.—Existence of Separable Controversy Must Be Shown By Plaintiff's Statement of His Own Case.—

A controversy is not separable unless it appears so to be from the plaintiff's own allegations. The rule here is the same as it is with reference to the existence of a Federal question.¹ It has one necessary qualification. As the plaintiff in bringing an action in a State Court is not required to allege the citizenship of either himself or the defendant, and usually does not do so, the fact of diverse citizenship may be set up by the defendant in his petition for removal. In all other respects, however, the rule is strictly enforced.

313. Right of Removal Because of Prejudice or Local Influence.—Section 28 of the Judicial Code makes provision for removal under still other conditions. It declares that

“where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause.”

² Geer vs. Mathieson Alkali Works, 190 U. S. 428.

¹ Ayres vs. Wiswall, 112 U. S. 187.

To be removable under this section the case must be one which originally could have been instituted in a Federal Court.¹

314. Do.—A Case Which Could Not Have Been Brought in a Federal Court May Not Be Removed Thereto on the Ground of Prejudice and Local Influence.—It has been held¹ that a case may be removed on the ground of prejudice or local influence, although it was a case which could not have been brought originally in the United States Court, as, for example, where citizens of the same State were on opposite sides of the controversy. This view, however, has been definitely determined to be unsound. The Supreme Court has said that the clause of the statute permitting removal on the ground of prejudice and local influence does not furnish a separate and independent ground of Federal jurisdiction, but describes only a special case comprised in the preceding clauses.²

315. Right of Removal of Cases Between Parties Claiming Lands Under Grants of Different States.—Provision is made by section 30 of the Judicial Code for the removal of cases in which plaintiff and defendants though both citizens of the same State, are claiming lands under grants of different States. Such a case may doubtless still sometimes arise, but not very often.

316. Right of Removal Because of Denial of Equal Civil Rights.—Section 21 of the Judicial Code provides for the removal of any civil suit or criminal prosecution commenced in a State Court against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States.

¹ Cochran vs. Montgomery County, 199 U. S. 260.

² Boatmen's Bank vs. Fritzlen, 135 Fed. 650.

² Cochran vs. Montgomery County, 199 U. S. 260.

This provision of law has been held constitutional.

In West Virginia in the early seventies all colored men were by law ineligible for jury service. A negro was there indicted for murder. It was held that he was entitled to have his case removed to the United States Court for trial.¹

The section is applicable only to cases in which such right is denied by the Constitution or laws of the State and not to cases where the denial results from the action of officers of the State, not authorized by the latter's Constitution or statutes.

The whole subject has been very thoroughly reviewed by the Supreme Court of the United States.²

317. Right of Removal of Suits or Prosecutions Against Revenue Officers or Officers of Either House of Congress.—Section 33 of the Judicial Code provides that whenever any civil suit or criminal prosecution is commenced in a Court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed into the District Court of the United States.

This legislation had its origin in the so-called Force Bill.³

¹ *Strauder vs. West Virginia*, 100 U. S. 303.

² *Kentucky vs. Powers*, 201 U. S. 1.

³ 4 Stat. 632, March 2, 1833.

The purpose is to protect the Federal Government against the possibly hostile proceedings of State tribunals. The collection of the Federal revenues may be greatly obstructed, if revenue officers of the United States can be prosecuted in the State Courts for acts done by them as such. The immediate occasion for this Act of Congress soon passed. It was not until forty-seven years had gone by, and after the statute itself had been amended, that its constitutionality came before the Supreme Court. Congress had made no special provision for the trial in the Federal Courts of alleged criminal violations of the State laws, and yet if the case which was removed into the Federal Court was a criminal prosecution that was the case which had to be tried. The Supreme Court, however, held that no legislation was needed. The case might be proceeded with in the United States Court as it would have been conducted in the State Court had no removal been had.²

A fairly broad construction has been given this statute. A corporal in the United States Army who had been detailed to aid a United States marshal in executing a warrant to arrest an alleged offender against the internal revenue laws, and who was indicted in the State Court for the murder of such offender, was held entitled to remove the case to the United States Court.³

This statute expressly includes both criminal prosecutions and civil suits. It follows that when a suit is brought in a State Court against a revenue officer of the United States to recover from him sums alleged to have been illegally exacted as taxes, he may remove the case to the United States District Court. The amount in controversy is immaterial.⁴

318. Removal Can Be Had to the District Court of That District Only in Which the State Court Suit is Pending.—Section 28 of the Judicial Code says that the removal shall be to the District Court of the proper district.

² *Tennessee vs. Davis*, 100 U. S. 257.

³ *Davis vs. South Carolina*, 107 U. S. 597.

⁴ *Venable vs. Richards*, 105 U. S. 636.

It has been contended that when neither the plaintiff nor the defendant are citizens of that district the suit may be removed to the district of the residence of one or the other on the ground that they are the only proper districts. In one case it has been so held.¹ In this district the other view has been taken.

A citizen of Wyoming sued a Maryland corporation in a Montana State Court. The defendant sought to remove the case to the United States District Court for the District of Maryland. The State Court refused to order the removal. Defendant then filed a transcript of the record in the United States District Court for Maryland. The latter held that it had no jurisdiction. It was pointed out that section 29 of the Judicial Code, which tells how the right of removal given by section 28 shall be exercised, specifically says that the petition shall ask for the removal of the suit into the District Court to be held in the district where such suit is pending; and attention was called to the fact that such provision had been embodied in all the Federal Statutes from the original Judiciary Act to the Judicial Code.²

319. The Right to Remove a Case Cannot Be Given By Consent.—A case may be removed only when the Federal statute so provides. It can never be removed merely because both parties are willing that it shall be.

320. The Right to Remove May Be Waived.—On the other hand, as it is a mere right of the parties, and under the present statute, a right confined to the defendant, he can exercise it or not as he sees fit. He may so act as to show that he has elected not to do so. This election he will conclusively evidence by not making his motion to remove within the time limited by law. It is easy to conceive of many other ways in which even before the expiration of the time in which, if at all, he must exercise this right, he may so act as to estop himself from so doing, upon the theory

¹ Stewart vs. Cybur Lumber Co., 211 Fed. 343.

² St. John vs. U. S. Fidelity & Guaranty Co., 213 Fed. 685.

that what he has done shows that he has agreed not to avail himself of it.

321. Right to Remove Not Waived By Contesting Case in State Court After Latter Has Refused Permission to Remove.—No such presumption can arise where the defendant has done all in his power to remove the case and has been held in the State Court against his will.

An Ohio administratrix sued an insurance company of New York in the Court of Common Pleas of Hamilton County, Ohio. The Insurance Company took the proper proceedings to remove the case to the United States Circuit Court for the Southern District of that State. The State Court refused to permit the removal. The Supreme Court held the subsequent proceedings of the Common Pleas Court to be a clear case of usurped jurisdiction, and that the defendant was not estopped by having defended itself in the State Court as best it could, after permission to remove had been refused.¹

In a subsequent case the Supreme Court said, in answer to the objection that the defendant had gone on with his case after the State Court had refused to permit it to be removed and thereby waived his right to remove.

“Indeed, it is difficult to see what more he could have done than he did do to get out of court and take his suit with him. He remained simply because he was forced to remain, and is certainly now in a condition to have the original error of which he complained corrected in any court having jurisdiction for that purpose.”²

322. Right to Remove Waived By Asking Affirmative Relief From State Court After Latter Has Refused Permission to Remove.—A defendant who has tried to remove his case and has been refused permission to do so, may, if the final judgment or decree be against him, sue out a writ of error from the Supreme Court and there assert that, as the denial of his petition to remove was erroneous,

¹ Insurance Co. vs. Dunn, 19 Wall. 214.

² Removal Cases, 100 U. S. 475.

the subsequent proceedings are not binding upon him. He may, however, by his conduct estop himself from contesting the jurisdiction of the State Court. He will do so if, after his case has been wrongfully retained, he asks for affirmative relief, as, for example, if he should bring a third party into the litigation.¹

323. Defendant Cannot Waive in Advance His Right to Remove All Cases.—While a defendant can in a particular case so act as to waive his right of removal, he cannot in advance make any agreement by which he waives this right generally. The question as to the power to do so has most frequently arisen in connection with attempted removals by non-resident corporations of suits against them.

324. State Law Requiring Corporations to Agree Not to Remove Into Federal Courts Invalid.—There has always been a desire on the part of many of the States to prevent corporations of other States or countries, doing business within them, from taking their litigation into the Courts of the United States. The efforts of the States to attain this end have often come before the Supreme Court.

It has been clearly settled that any statute which requires a non-resident corporation as a condition of doing business in the State to agree that it will not remove any case into the Federal Court is invalid.¹ Such a consent to forego its constitutional rights may not be exacted of a corporation whether it is or is not engaged in interstate commerce.

One of the cases already cited was that of an insurance company, which was not conducting commerce between the States; the other of a railroad, which was.

325. A State May Revoke the License to Do Business of a Non-Resident Corporation Not Engaged in Interstate Commerce Which Removes a Case Into the Federal Courts.—The exercise, however, by a non-resident

¹ *Texas & Pacific R'way Co. vs. Eastin & Knox*, 214 U. S. 153.

² *Insurance Co. vs. Morse*, 20 Wall. 445; *Barron vs. Burnside*, 121 U. S. 186.

corporation not engaged in interstate commerce of its right to remove a case into the Federal Courts may entail upon it unpleasant consequences from which the Courts of the United States cannot protect it. Thus, it has been held that a State has the absolute right to say whether a non-resident corporation, not engaged in interstate commerce, shall do business within its borders or not. It may not, as a condition of permitting that corporation to do such business, require it to surrender any constitutional right such as that of removal. But it may, whenever it chooses and for any reason or for none, refuse or withdraw such permission. It is immaterial that the motive for such withdrawal is a wish to penalize the corporation for removing a case into the Federal Courts.¹

326. A State May Not Arbitrarily Exclude From Its Borders a Non-Resident Corporation Engaged in Interstate Commerce.—The rule is different as to non-resident corporations engaged in interstate commerce. The State cannot either take away the right of removal or punish its exercise.¹

327. State Laws Prohibiting the Removal of Certain Classes of Suits Invalid.—Sometimes the States have attempted to provide that certain kinds of actions, or actions in which certain classes of corporations are defendants, shall be brought in a particular Court only. Thus—

The State of Nevada authorized Lincoln County to issue bonds and provided that litigation concerning them should be carried on in a particular State Court and not elsewhere. A holder of the bonds brought suit against the county in the Circuit Court of the United States for the District of Nevada, and the Supreme Court held that he had the right to do so. The power to contract with citizens of other States implies liability to suit by them, and no statutory limitation of that

¹ Doyle vs. Continental Insurance Co., 94 U. S. 535; Security Mutual Life Insurance Co. vs. Prewitt, 202 U. S. 246.

¹ Harrison vs. St. Louis & San Francisco R. R. Co., 232 U. S. 318.

liability imposed by a State, can defeat a jurisdiction given by the Constitution.¹

In Iowa the Probate Court had exclusive jurisdiction to determine the validity of claims against the estate of a deceased person. The proceeding involved a judicial determination as to the liability of the estate for the amount of the claim, with parties before the Court to contest all questions of law and fact. It was clearly a suit within the meaning of the Removal Acts. A claimant had a case removed from the Probate Court to the Circuit Court of the United States. The Supreme Court said:—

“The removal in this case was, therefore, proper, unless it be competent for a State, by legislative enactment conferring upon its own courts exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of the estates of deceased persons, to exclude the jurisdiction of the courts of the United States even in cases where the constitutional requirement as to citizenship is met. But this court has decided, upon full consideration, that no such result can be constitutionally effected by State legislation.”²

328. Right of Removal as Affected by Venue Provisions.—The provision that a defendant may not be sued except in a particular district or districts is a personal privilege given him which he may waive, and he does waive it by entering a general appearance.¹

A defendant who seeks to remove a case from a State to a Federal Court of a district in which he could not have been sued without his consent, waives the objection to the jurisdiction of the latter Court. If the plaintiff takes any other action in the United States Court than to move to remand, he, also, waives his right to object to its jurisdiction. Both of them are thereafter estopped to question the propriety of the District Courts proceeding with the case.²

¹ Lincoln County vs. Luning, 133 U. S. 529.

² Clark vs. Bever, 139 U. S. 102.

¹ Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S. 368.

² *In re Moore*, 209 U. S. 490.

329. Right of Removal as Affected by Assignment Provisions.—Prior to 1887 the provision that an assignee of a chose in action could not sue in the Federal Court unless the original contracting party to whose rights he had succeeded could have there sued, had no application to cases originally brought in a State Court and which the defendant sought to remove to the Federal. Such cases were not within the mischief against which the assignment provision was directed. It was the defendant who exercised the right of removal. He, of course, had nothing to do with any collusive transfer of the contract to the person who was seeking to hold him liable. It might be that the assignment had actually been made for the purpose of putting the claim in the name of one who would have local bias in his favor. Whether it had been or not, the defendant would be quite as likely to suffer from State or sectional prejudice as he would, had the contract originally been made with the assignee.

All the earlier decisions distinctly recognize that if "A," a citizen of New York, contracted with "B," a citizen of the same State, and "A" assigned his rights to "C," a citizen of Pennsylvania, and "C" sued "B" in the Courts of Pennsylvania, "B" could remove the case to the Circuit Court of the United States for that district of Pennsylvania in which the suit was brought. But the Act of 1888 laid down a new rule. It provided that no case could be removed unless it was a case which originally could have been brought in the Court of the United States to which removal was sought. It is clear that "C" could not have sued "B" in the Federal Court. It follows that such a case cannot now be removed.

A Colorado corporation had certain claims of large amount against another Colorado corporation. It assigned those claims to a citizen of New York, who brought suit against the defendant corporation in one of the State Courts of New York. The defendant sought to remove the case into the United States Circuit Court for the Eastern District of New York. It was held that it could not do so.¹

¹ Mexican Nat'l R. R. Co. vs. Davidson, 157 U. S. 201.

330. Actual Plaintiff May Prevent Removal By Making Fictitious Assignment.—A plaintiff may so arrange matters as to make it impossible for a defendant to remove a case. Two Iowa corporations had claims against a citizen of New York. They transferred those claims to another citizen of New York under an agreement by which he was to exercise reasonable diligence to enforce them, and after deducting all costs and expenses incurred in so doing he was to hold the amounts collected in trust for the use and benefit of the parties owning the same. He brought suit in an Iowa State Court. The defendant attempted, under an earlier statute, to remove the case into the United States Court, alleging that the plaintiff was only a nominal party and had no interest therein whatever, but was prosecuting the suit for the sole and exclusive use and benefit of the Iowa corporations, which employed counsel to prosecute it and were directing and controlling it. The Supreme Court said:—

“It may, perhaps, be a good defense to an action in a State court, to show that a colorable assignment has been made to deprive the United States Court of jurisdiction; but * * * it would be a defense to the action, and not a ground of removing that cause into the Federal Court.”¹

331. How Plaintiff May Prevent Removal By Joining as a Defendant a Resident of the State.—A much more common way, however, of preventing the removal of a case from the State to the Federal Courts is for the plaintiff to join in one action the non-resident defendant with others who are residents. This has become not unusual in negligence cases. Where, for example, someone has suffered an injury upon a railroad operated by a non-resident corporation, the plaintiff may bring suit against the railroad, uniting as defendants some of its employees who happen to be citizens of the State.

A woman was killed by a train of the Alabama Great Southern Railway, an Alabama corporation. Her adminis-

¹ Oakley vs. Goodnow, 118 U. S. 43.

trator, a citizen of Tennessee, brought suit in a Court of the latter State against the Railway Company and against two citizens of Tennessee, respectively, the conductor and engineer of the train. In his complaint he charged that the accident was the result of the joint negligence of all the defendants. The Railway Company attempted to remove the case to the United States Court. The Supreme Court held that the right to remove depended upon the case alleged by the complaint. It said: "The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal." The Court added:—

"It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the State courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." * * * "In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the State court by the filing of a declaration in which he alleged a joint cause of action. Does this become a separable controversy within the mean of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly?"

The Court thought not.¹

332. Defendant May Show Joinder of Resident to Be Fraudulent.—If the defendant proves that the joinder is fraudulently made for the purpose of defeating removal, he can remove.

The plaintiff attempted to prevent a removal by joining as co-defendants with the principal defendant one of the latter's employees, a citizen of plaintiff's State. Defendant

¹ Alabama Great Southern Ry. Co. vs. Thompson, 200 U. S. 206.

filed its petition for removal and submitted affidavits tending to show that the employee sued had no possible connection with the matter and had been joined for the mere purpose of preventing a removal. The State Court ordered the removal. In the Federal Court the plaintiff moved to remand and filed counter affidavits. The Court reached the conclusion that the joinder was fraudulent and denied the motion. The Supreme Court affirmed the ruling below.¹

It is necessary in such cases that the defendant in the petition for removal shall allege facts which, if true, will show the joinder to have been fraudulent.²

333. Filing of Petition for Removal Does Not Waive Objection to Jurisdiction of State Court.—Very frequently a non-resident defendant wishes to claim that he has never been properly served with process in the State Court. He prefers to have the Federal Court determine whether he has or has not. It has been contended that when he comes into the State Court and files his petition for removal he thereby waives the objection that he has not been properly summoned. It is, however, clearly settled that no such waiver is thereby made. He can, and frequently does, successfully assert in the Federal Court his claim that the State Court never secured any jurisdiction over him.¹

334. How a Case May Be Removed.—Section 29 of the Judicial Code specifies what a defendant, who wishes to remove one of the more ordinary kind of removable cases, on grounds other than for prejudice or local influence, shall do. He must prepare a duly verified petition setting forth facts which entitle him to remove and praying the State Court to direct the removal. This petition should contain all the necessary jurisdictional averments. If any of them are omitted, but are to be found in the previous record of the case, the

¹ Wecker vs. National Enameling & Stamping Co., 204 U. S. 176.

² C. & O. Ry. Co. vs. Cockrell, 232 U. S. 146.

¹ Wabash Western Ry. Co. vs. Brow, 164 U. S. 271.

omission may not necessarily be fatal. To omit any of them is, however, to run unnecessary risk. He must make and execute a bond with a sufficient surety that he will cause a certified copy of the record to be entered in the United States District Court within thirty days, and that he will pay all costs if the District Court shall hold that the removal was improperly made. Before he presents this petition and bond to the State Court he must give written notice to the other side that he proposes to do so.

335. Do.—Except When There is a Separable Controversy or Prejudice or Local Influence, All Defendants Must Join in the Petition for Removal.—Unless there is a separable controversy or prejudice or local influence is alleged, all the substantial defendants must join in the petition for removal.

Purely nominal or formal parties need not. Parties who are sued, but who are not served with process are not defendants in the action. It suffices if all who are summoned join in the application.

336. Do.—For Prejudice or Local Influence.—The application to remove a case on the ground of prejudice or local influence is made not to the State Court, but to the District Court of the United States, although it is not a bad practice to file in the State Court a copy of the petition presented to the District Court, together with the supporting affidavits.¹ These affidavits should set forth the facts which tend to show the existence of prejudice or local influence to such an extent as to make it probable that the defendant seeking to remove will not be able to obtain justice in the State Court or in any other State Court to which he would have the right to remove the case. The plaintiff may appear in the District Court and file rebutting affidavits or the Court may hear oral testimony in support of the petition and in opposition thereto. If the United States Court decides that the allega-

¹ Bonner vs. Meikle, 77 Fed. 485.

tions of the petition have been sustained, it orders its clerk to certify to the State Court the order of removal, together with copies of the petition, bond and affidavit. The State Court is thereby advised of the action of the Federal Court and of its order of removal. It is the duty of the former to proceed no further with the suit and to direct its clerk to make a full and complete transcript of the record and certify the same to the United States Court for trial.²

337. Do.—A Single Defendant May Remove on Ground of Prejudice or Local Influence.—In order to remove on the ground of prejudice or local influence, the defendant seeking such removal must be a non-resident of the State in whose Courts the suit has been brought. On the other hand, he may remove upon this ground without his co-defendants uniting in the petition for removal, and although there may be no separable controversy. The proviso following this portion of the section makes this clear. It says: "Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court." That is to say, a single non-resident defendant against whom prejudice or local influence operates, has the right to remove the case, whether it contains a separable controversy or not. When it gets over into the United States Court, if it then be made to appear that there is a separable controversy and that one or more of those separable controversies may be remanded to the State Court for separate trial without danger of injustice, such order will be made.

338. Do.—In Cases of Removal Because of Denial of Civil Rights.—In cases where removal is sought under

² Southern Railway Co. vs. Allison, 190 U. S. 326.

the provisions of section 31 of the Judicial Code, the petition for removal may be filed at any time before the trial or final hearing. It should be filed in the State Court and need not be accompanied by any bond.

339. Do.—In Cases Against Persons Acting Under Revenue Law.—These petitions must be filed in the United States Court and not in that of the State. They may be filed at any time before the trial or final hearing. These last words are the same which were used in earlier Removal Acts. They were there held to refer to the final trial. It follows that if there has been a mis-trial the petition for removal if filed before the new trial begins will be filed in time.¹

340. Do.—State Court Must in First Instance Decide Whether Upon the Record the Case is Removable.—The State Court must of necessity before passing the order for removal determine whether upon the face of the record the case is removable, assuming the verity of all defendant's assertions of fact. If it conclude that it clearly is not, the order for removal should be refused and the case proceeded with.¹ The defendant may, however, procure a transcript of the record and file it in the Federal Court. In this way he can secure a decision of the latter on the question of removability. If such decision is in the affirmative he may have further proceedings in the State Court enjoined. It is therefore expedient that the latter direct a removal unless it is clear either that the case is one, the removal of which is not authorized by law, or that the defendant has failed in some material respect to do all that the law requires of him to entitle him to remove.

341. Do.—State Court Need Not Permit a Removal on Defective Petition.—If the petition is defective the State Court may permit it to be amended,¹ but will doubt-

¹ Insurance Co. vs. Dunn, 19 Wall. 214; B. & O. R. R. Co. vs. Bates, 119 U. S. 467.

¹ Madisonville Trac. Co. vs. St. Bernard Mining Co., 196 U. S. 239.

¹ Roberts vs. Pacific & A. Ry. & Nav. Co., 104 Fed. 577.

less be justified in refusing to order the removal of the case, if leave to amend is not sought, even although it may think it possible that by amendment the shortcoming could be supplied. If it does and the defendant avails himself of his right to file the transcript of record in the Federal Court he will take nothing by it; as his petition for removal is insufficient, the latter Court acquires no jurisdiction. It obviously cannot permit any amendment of the removal petition, because neither that nor any other part of the record is properly before it. On the other hand, if the State Court actually directs the removal, although it might properly have declined to do so, the case comes into the District Court, and the latter must pass upon the sufficiency of the proceeding by which the transfer was affected.

342. When and How Far the Petition for Removal is Amendable.—Whether the District Court may permit an amendment of a petition for removal at all has been doubted. It now seems settled that it may. There is still room for difference of opinion as to the circumstances under which the right may be exercised, and as to how far the amendment may go.

The allegation of a petition for removal was that the “plaintiff is a citizen of Missouri and the defendants are citizens of the State of New York.” No question was made by any of the parties either in the Court below or in the Supreme Court as to the propriety of a removal. The latter of its own motion, nevertheless, held that as the petition for removal did not allege the citizenship of the parties except at the date when it was filed, and as it was not shown elsewhere in the record that the defendants were, at the commencement of the action, citizens of a State other than the one of which the plaintiff was at that date a citizen, the Circuit Court had no jurisdiction. The Supreme Court refused to pass upon the merits of the appeal, and reversed the judgment and remanded the case to the Circuit Court with directions to send it back to the State Court.¹

¹ Stevens vs. Nichols, 130 U. S. 230.

The history of a subsequent case was as follows:— On August 24, 1899, plaintiff commenced suit in the District Court of Salt Lake County, Utah. On September 2, 1899, the defendant filed a petition and bond for removal to the Circuit Court of the United States for the District of Utah. That petition alleged “that the controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of the suit and still is a resident and citizen of the City of Denver, in the State of Colorado.” On December 30, 1899, the plaintiffs moved to remand on the ground that the diverse citizenship of the parties at the time of the commencement of the suit and at the time of its removal from the jurisdiction of the State Court did not appear upon the record. On January 2, 1900, the defendant gave notice of a motion to amend its petition for removal by adding this allegation:— “That the plaintiffs, and each of them, were, at the time of the commencement of this suit, and still are, citizens and residents of the City of Salt Lake and State of Utah.” The Supreme Court held that the amendment could be made, it having been offered before any action had been had in the Federal Court on the merits of the case. Upon the actual facts the appellee was entitled to remove, and nothing to prejudice the rights of the plaintiff had been done before the petition for removal was perfected.²

Nevertheless, it is exceedingly important for the defendant to make sure that his petition as first filed is right and needs no amending. A plaintiff may notice a defect in the petition and say nothing about it. He may let the case be tried on its merits. If the judgment is against him he may even then secure its reversal and a remanding of the case to the State Court. This danger is perhaps not so great as it once was. Prior to 1904, when the *Kinney vs. Columbia Savings and Loan Association*, above referred to, was decided, the Supreme Court, without looking into the merits, had fre-

² *Kinney vs. Columbia Svgs. & Loan Asso.*, 191 U. S. 78.

quently reversed judgments below and sent cases back with instructions to remand to the State Courts. All that the Kinney case decided was that when leave to amend is asked before any action has been taken on the merits it may be granted.

343. Determination of All Disputed Questions of Fact as to the Right to Remove is With the Federal Court.—The State Court is bound to accept as true the averments of fact contained in the petition for removal. If the plaintiff would dispute them he must do so in the Federal and not in State Court.¹

344. Defendant May Remove Without Consent of State Court.—A defendant, who has been improperly denied the removal for which he has asked, need not await a judgment or decree against him. He may file a transcript of the record in the proper United States District Court and may then ask it to enjoin further proceedings in the State tribunal.

Section 39 of the Judicial Code makes elaborate provision to insure that a defendant who is entitled to remove his case shall not be prevented from so doing. The clerk of a State Court who will not, upon tender of proper fees, make out a transcript of the record, commits an offense against the United States, and upon conviction may be fined not more than \$1,000 or imprisoned not more than a year, or both. The District Court to which the case is removable is empowered to issue a writ of *certiorari* to the State Court commanding the latter to make a return of the record.

By section 35, if the clerk refuses or neglects, upon payment or tender of the legal fees, to furnish the transcript, the United States District Court may direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow.

¹ C. & O. Ry. Co. vs. Cockrell, 232 U. S. 146.

345. Federal Court May Enjoin Plaintiff From Proceeding in State Court.—When a defendant has presented his petition for removal and the State Court has improperly refused it and he has caused a transcript of the record to be filed in the Federal Court, the latter will at his request enjoin the plaintiff from further prosecuting his action in the former.¹

346. When Petition for Removal Must Be Filed.—In all cases covered by section 28, except those in which the removal is asked for on the ground of prejudice or local influence, the defendant must make and file his petition for removal in the State Court at or before he is required by the laws of the State or the rules of the Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff.

347. Required to Answer or to Plead Means Earliest Time Defendant is Required to Make Any Kind of Plea or Answer.—Under the rules of practice prevailing in most of the States, a defendant if he wishes to plead limitations or in abatement must do so at a somewhat earlier period than that at which he is required to plead to the merits. A Maryland corporation was sued in a West Virginia Court by a citizen of that State. If it had desired to plead to the jurisdiction or in abatement it would have had to do so at the April rule day. After that date, but while it still might plead to the merits, it filed its petition for removal. The Supreme Court held that under the language of the Statute the petition for removal must be filed at or before the time the defendant is required to make any defense whatever in the State Court, so that if the case be removed, the validity of any or all defenses may be tried and determined in the Federal tribunal. It followed that the defendant's petition had not been filed in time.¹

¹ *Madisonville Traction Co. vs. Saint Bernard Mining Co.*, 196 U. S. 239; *Donovan vs. Wells, Fargo & Co.*, 169 Fed. 363.

² *Martin vs. B. & O. R. R. Co.*, 151 U. S. 684.

348. Time in Which Removal Must Be Sought Does Not Begin to Run Until Suit Becomes for the First Time Removable.—A plaintiff may in his declaration claim a sum not exceeding \$3,000. He may bring his action against two defendants, only one of whom is a citizen of another State. He may not base his claim to recover upon any Federal right. Later, and after the time at which the defendant is required to plead, and after the non-resident defendant has in fact pleaded, plaintiff may amend by increasing his claim for damages to upwards of \$3,000, by discontinuing as to the resident defendant, or by setting up a Federal right. If the declaration or bill had originally been framed in its amended form the non-resident defendant would have been entitled to remove the case to the Federal Court. As it was in fact first drawn, the case made was a non-removable one. Does the defendant lose his right to have the case sent to the Federal Court, because he did not ask to have it removed before the time at which he was required to plead to or answer the original declaration or complaint? If he does, a plaintiff has always at his command an easy way of preventing the possibility of removal. The Supreme Court, in accordance with obvious justice and common sense, has held that a defendant's petition for removal is filed in time if it be filed so soon as the cause assumes a removable form.¹

349. When Petition to Remove on Ground of Prejudice or Local Influence Must Be Filed.—Section 29 says that the petition to remove on the ground of prejudice and local influence may be filed at any time before trial. The defendant therefore may ask for a removal on this ground at a later date than he could on others. He must, however, make the application, as the statute directs, before trial, and that means before the first trial of the cause. He cannot apply for a removal after the case has been once tried, although the verdict and judgment has been set aside or even though the jury failed to arrive at a verdict at all.¹

¹ Powers vs. Chesapeake & Ohio R. Co., 169 U. S. 92.

¹ Fisk vs. Henarie, 142 U. S. 459.

350. Right to Object That Petition for Removal was Not Made in Time May Be Waived.—It is, however, clearly settled law that the time of the removal is not a jurisdictional matter in the sense that the parties cannot waive it. They do waive the right to object to the removal on that ground if they go to trial in the Federal Court without raising the objection.

In the case of *Martin vs. B. & O. R. R. Co.*,¹ the Court held that the State Court could have refused to order the removal, and that, after it had done so, a motion to remand promptly made in the Federal Court would have been granted. Nevertheless, it went on to say, that no objection to the removal had been made in the State Court and no motion to remand in the Federal. It then added:—

“The time of filing a petition for the removal of a case from a State court into the Circuit court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different States.” * * * It “is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district.”

It was held that by proceeding to the trial of the case the plaintiff had waived the objection.

351. No Appeal From Order of District Court Remanding Case to State Court.—By section 28 of the Judicial Code it is provided that if the District Court shall decide that a cause has been improperly removed into it from the State Court, and order the same to be remanded, such remand shall be immediately carried into execution and no appeal or writ of error from the remanding decision shall be allowed.

¹ 151 U. S. 684.

CHAPTER XII.

ANCILLARY JURISDICTION OF THE FEDERAL COURTS.

352. Ancillary Jurisdiction.—The principal heads of the original jurisdiction of the District Courts, whether exclusive or concurrent, have been enumerated. Many of them have been discussed in some detail. Something has been said about the jurisdiction which may be acquired by removal of cases from State tribunals.

All the jurisdiction of the Federal Courts thus far discussed depends either upon the character of the parties or upon the kind of questions in controversy. They exercise, however, another jurisdiction, usually referred to as ancillary or dependent.

In spite of the terms of the statutes, and of all that has been said as to the limited jurisdiction of the United States Courts, there are cases in which they can properly decree the payment of a debt, perhaps of a few cents, due by a Maryland citizen to another citizen of that State.

353. Do.—Illustrations—Creditor's Bills.—For example—A corporation of Maryland, with its principal office in Baltimore City, was indebted in a sum of much more than a hundred thousand dollars to a citizen of New York. It was insolvent. The citizen of New York, in the United States Court for the Maryland District, filed a creditor's bill against it. He prayed that receivers be appointed for its property and that the latter should be reduced to money and divided among its creditors. The corporation appeared, admitted the allegations of the bill and consented to the passage of the decree asked for. It thus waived its right to insist that plaintiff must first secure a judgment at law.¹ Receivers were

¹ Hollins vs. Brierfield Coal & Iron Co., 150 U. S. 371.

accordingly appointed. The Court through them took possession of the corporate property. Ultimately all the assets were sold under the order of the Court. Notice was given to all creditors to come in and file their claims. They did so, many of them being Maryland individuals, firms or corporations, their claims varying in amount from a dollar or two to many thousands. Had any of these claims been disputed, the question as to whether they were or were not owing and what was their amount could and doubtless would have been tried out in the Court sitting in equity. In point of fact no such controversies arose, but by the auditor's report stated in the course of the proceedings, various sums were decreed to be paid to the Maryland creditors. As to these claims there was not any diverse citizenship. No Federal question of any kind was involved. Very many of the creditors were claimants of sums less than \$2,000, the amount then required to give jurisdiction to the Federal Courts over original suits.

354. Ancillary Jurisdiction Dependent Upon the Possession of the Res.—Upon what did the jurisdiction of the Court to pass upon these claims and to allow them, rest? Briefly, upon the fact that it had in its possession the property of the defendant, and was required to dispose of that property in accordance with equity and good conscience. It is a well settled principle of law that so long as one Court has possession of property, no other Court of co-ordinate jurisdiction can exercise control over it. The Federal Courts have been unusually careful to observe this rule in their relations with the State Courts and to insist that the State Courts in turn shall observe it with respect to them. It makes very little difference whether custody was rightfully or wrongfully taken; in any case the redress must be sought from the custodian Court itself or upon appeal from such appellate tribunal as has the right to review its proceedings. It follows as an almost necessary consequence that those persons who cannot seek redress anywhere but in a particular

Court, shall have the right there to demand it, no matter what their citizenship, or how small; from a pecuniary standpoint their interest in the litigation.

355. Do.—Illustrative Cases—Freeman vs. Howe.—

There have been some interesting applications of this doctrine.

A citizen of New Hampshire had a pecuniary claim against a Massachusetts corporation. He instituted suit in the United States Circuit Court for the District of Massachusetts, and, as was permitted under the State practice, took out an attachment. Under this attachment a large quantity of property belonging to the defendant corporation was seized by the Marshal. It was subject to the lien of a mortgage given to certain citizens of Massachusetts as trustees for bondholders. These trustees sued out in the State Court a writ of replevin. The Supreme Judicial Court of Massachusetts held that the property was properly taken under the writ. On writ of error from the Supreme Court of the United States, this decision was reversed. The Court distinctly held that, although the writ of attachment authorized the Marshal to seize nothing but property of the defendant corporation, yet, as he had actually seized this other property under the writ, it was in the custody of the United States Court.¹ The Supreme Court said the Massachusetts Court was in error in supposing that the plaintiffs in the replevin suit, being citizens of Massachusetts, as was the Marshal, were remediless in the Federal Courts. It pointed out that the "principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby preventing injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

¹ Freeman vs. Howe, 24 How. 450.

356. Do.—Buck vs. Colbath.—There are, of course, limitations upon this doctrine. In *Buck vs. Colbath*,¹ suit was brought by a citizen of Minnesota against another citizen of that State for trespass *d. b. a.* The defendant pleaded that he was Marshal of the United States for the District of Minnesota and that he took the goods under a writ of attachment against certain parties other than the plaintiff in the suit against him. He did not aver in his plea that they were the goods of the defendant to the writ of attachment. At the trial the plaintiff made proof of his ownership. The defendant relied solely on the fact that he was Marshal and held the goods under the writ in the attachment suit. The Supreme Court said:

“It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions.” * * * “It is obvious that the action of trespass against the marshal in the case before us, does not interfere with the principle thus laid down and limited.” * * * “Property may be seized by an officer of the court under a variety of writs, orders, or processes of the court. For our present purpose, these may be divided into two classes. First, those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property.” * * * “Second, those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken.” * * * “In the first class he

¹ 3 Wall. 341.

has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts. In addition to this, in many cases the court which issued the process will interfere directly to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not." * * * "In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. First, in ascertaining that the property on which he proposed to levy, is the property of the person against whom the writ is directed; secondly, that it is property which, by law, is subject to be taken under the writ; and thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice." * * * "The Court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else."

It was held that the Marshal was liable. It will be noticed, however, that there was no attempt by State Court process to take the property seized out of his hands.

357. Do.—Jurisdiction in Original Suits Extends to Ancillary and Supplementary Proceedings.—The doctrine in *Freeman vs. Howe*, as limited by *Buck vs. Colbath*, has been consistently adhered to. Thus, where a railroad property was in the possession of a receiver of the United States Circuit Court for the District of Wisconsin, it was

held that any litigation for the possession of the property must take place in that Court, no matter what the citizenship of the parties might be. There it was sought to test the question as to the right of possession by what was called a supplemental bill. It was said that it was brought in violation of the rules of equity pleading; that the subject matter and the new parties made by it were not such as could properly be brought before the Court by that class of bills. The Supreme Court said:

“But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State Courts. No one, for instance, would hesitate to say that, according to English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law. The case before us is analogous. An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the court.”¹

The Circuit Court of the United States for the Southern District of Illinois had taken possession of a railroad under a bill filed to foreclose a mortgage, and had placed it in the hands of a receiver. Subsequently an Illinois creditor sued out an attachment in the State Court and seized some of its property, whereupon the original complainants intervened and applied for the removal of the case to the Federal Court.

¹ Minnesota Co. vs. St. Paul Co., 2 Wall. 632.

The parties entered into an agreement which was silent as to their citizenship, but which provided for the removal of the proceedings to the United States Court. The Supreme Court held that the removal was not only permissible, but that it was the proper thing to do. The jurisdiction of the Circuit Court of the United States did not "depend on the citizenship of the parties, but on the subject-matter of the litigation. That was in the actual possession of that Court when the State Court attempted to levy its writ of attachment on the property. It was for the Court having such possession to determine how far it would permit any other Court to interfere with that possession."²

A judgment recovered in a suit brought against a Federal receiver for a transaction growing out of his conduct of business, as permitted by Act of Congress,³ cannot be enforced by execution upon the property in his hands. Satisfaction of it can be obtained only through the order of the Court, under whom the defendant is acting.⁴

358. Do.—Even When Possession of Res Is Irregularly Acquired Exclusive Jurisdiction May Attach.—

Citizens of States other than Louisiana obtained from the United States Circuit Court for the District of Louisiana certain writs of attachment. These writs were sued out and issued on Sunday, and by the law and practice in Louisiana they were for that reason invalid. The Marshal, however, acted under them and seized the property, such seizure also being made on Sunday. A few minutes after midnight—that is, on the following Monday morning,—a citizen of Louisiana got out an attachment from the State Court, but the sheriff was not allowed to serve it by the Marshal who held possession under the Sunday attachments. A little later on Monday morning the original plaintiffs sued out new

² People's Bank vs. Calhoun, 102 U. S. 256.

³ Sec. 299, *supra*.

⁴ Gableman vs. Peoria, Etc., Ry. Co., 179 U. S. 335.

writs of attachment in the Federal Court, and under them the Marshal continued to hold the property. Subsequently the creditor who had attempted to proceed in the State Court filed his petition in the Federal, and asked to be given a preference out of the proceeds of the goods to the amount of the claim for which he had attached. The Supreme Court held that he was entitled to this preference; that the Marshal had no right to hold the property under the Sunday attachments; yet as they were not absolutely void on their face, and as he actually held it, the creditor who had sought the aid of the State Court had been compelled to come into the Federal, but that the latter would give him all the rights that he would have had, if the Marshal had acted properly.¹

359. Do.—Citizenship of Intervenor Usually Immaterial.—Certain non-resident creditors filed a creditors' bill in a State Court of Mississippi, and subsequently removed it to the Circuit Court of the United States for the Southern District of that State. Afterwards other creditors who were citizens of Mississippi intervened in the case and were admitted as parties plaintiff. It was objected that, as thereafter there were citizens of Mississippi on both sides of the controversy, the Court was without jurisdiction. The Supreme Court answered: "The right of the Court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill."¹

360. Federal Courts of Equity Have Exclusive Jurisdiction to Enjoin Enforcement of Federal Judgments.—An amusing illustration of how much difference it may

¹ Gumbel vs. Pitkin, 124 U. S. 131.

¹ Stewart vs. Dunham, 115 U. S. 64.

make whether the proceeding is in essentials an original one or merely ancillary or dependent, is afforded by the case of *Johnson vs. Christian*.¹

In that case the bill was filed to release certain lands from a deed of trust and to remove a cloud upon the title growing out of a sale and deed. On April 16, 1888, the Supreme Court announced that on looking into the record "we can find no evidence of the jurisdiction of the Circuit Court. The bill commences in this way: 'The complainants, George Christian and Jerry Steuart, citizens of the County of Chicot and State of Arkansas, would respectfully represent,' etc. Joel Johnson is the sole defendant, but there is no allegation as to his citizenship, nor does that appear anywhere in the record." The decree below in favor of the plaintiffs was accordingly reversed. Thereupon the attention of the Court was called to the fact that a paragraph of the bill set forth that by virtue of the sale which it was sought to set aside, the defendant had instituted a suit in ejectment on the law side of the United States Court for the District of Arkansas, and "your complainants, not being admitted to interpose their equitable defense to the same he did" * * * "obtain judgment in ejectment against them." On the 14th of May in the same year the Supreme Court admitted that it had overlooked this allegation; that it was sufficient to give the Circuit Court jurisdiction of the case without any averment of the citizenship of the parties; the suit in equity was merely an incident of, and ancillary to, the ejectment suit, and no other Court than the one which rendered the judgment in ejectment could interfere with it or stay process in it on the ground set forth in the bill.

In the case of *Compton vs. Jesup*, the whole subject was ably reviewed by the then JUDGE TAFT, speaking for the Circuit Court of Appeals for the Sixth Circuit.²

361. Federal Court Has Jurisdiction of Suits by its Receivers Irrespective of Citizenship or Amount in Controversy.—The Supreme Court of the United States

¹ 125 U. S. 642.

² *Compton vs. Jesup*, 68 Fed. 263.

has recognized a logical extension of this doctrine to a subject of great practical importance. It has held that a Circuit Court of the United States has jurisdiction, in a general creditors' suit properly pending therein for the collection, administration and distribution of the assets of an insolvent corporation, to hear and determine an ancillary suit instituted in the same Court by its receivers, in accordance with its order against debtors of such corporation, although in such suit the receiver claims the right to recover from the debtor a sum less than the amount required by Par. 1 of Sec. 24 of the Judicial Code. The Supreme Court said:

"it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed. This position is entirely correct, so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits." * * * "In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction." * * * "There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of the want of diverse citizenship, as upon the ground that the requisite amount is not involved."¹

362. Injunctions Against Proceedings in State Courts—Federal Courts May Not Ordinarily Enjoin Proceedings in State Courts.—One of the best established heads of equity jurisdiction is the issue of injunctions to pro-

¹ White vs. Ewing, 159 U. S. 36.

hibit the institution or prosecution of suits at law. In the Federal Courts of Equity that jurisdiction, so far as it relates to suits in the Federal Courts, remains unimpaired, but Congress, having in view the dual nature of our Government, and for the purpose of preventing unseemly conflicts of jurisdiction between State and Federal Courts, has provided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."¹

363. Do.—Neither State Court Nor its Suitors May Be Enjoined.—While the language of the statute simply forbids injunctions to stay proceedings in the State Courts, it means that such writs of injunction are not to be issued to the parties to those proceedings, and not merely that the Federal Court shall not enjoin State Courts. The method of enjoining proceedings in other tribunals has always, or nearly always, been by enjoining the parties from prosecuting, and therefore an injunction from a Federal Court to prohibit an individual from instituting or prosecuting a suit in a State Court is within the mischief intended to be guarded against by the statute.¹ With the exception of cases in bankruptcy, under the limited liability Acts of Congress protecting vessel owners, or in which an injunction is necessary for the protection of its own suitors, and the enforcement of its own decrees, a Federal Court may not grant a writ of injunction restraining individuals from instituting or prosecuting suits in the State Courts.

364. Do.—Federal Court May Enjoin State Court Proceedings When Necessary to Enforce its Own Decrees or Judgments.—In spite of this sweeping prohibition, it has been decided that where a case is properly pending in a Court of the United States, and that Court has proceeded to judgment or decree therein, it may, if necessary to

¹ R. S., sec. 720.

¹ Central National Bank vs. Stevens, 169 U. S. 461.

give effect thereto, enjoin parties from instituting or prosecuting actions in State Courts.

Thus, a replevin proceeding was instituted in a State Court for Cook County, Ill., a replevin bond given and the property seized. The plaintiffs, who under the then existing statutes had the right to remove, filed a proper petition for the removal of the case to the Circuit Court for the Northern District of Illinois. The defendants opposed the removal and the State Court refused to order it. The plaintiffs, however, as they were authorized by law to do, filed a transcript of the record in the Circuit Court of the United States for the District of Illinois. That Court held that it had jurisdiction, and upon appeal to the Supreme Court of the United States its decree was affirmed. Before the appeal was heard the State Court had gone ahead with the case, which it held to be still pending before it, and decided in favor of the defendants and ordered a return to them of the property replevied. This order was not obeyed. Thereupon the defendants began suit on the replevin bond.

The United States Circuit Court for the Northern District of Illinois enjoined the prosecution of this proceeding in the State Courts. Upon appeal the Supreme Court held that it was right in so doing. The Court said:

"The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them. A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court." * * * "The original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending, and was finally determined in the United States Circuit Court. That Court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom

he represented, their agents and attorneys. The bill in this case was filed for that purpose and that only.”¹

365. Do.—Enjoining State Court Judgments on the Ground That They Were Procured by Fraud, Accident or Mistake.—The jurisdiction of a Court is not exhausted by the rendition of a judgment; it continues until the judgment is satisfied.¹

Ordinarily, therefore, a Federal Court has no jurisdiction to enjoin the holder of a State Court judgment from enforcing it. To this rule there is no exception where the inequity of allowing the enforcement is based upon an error in the proceedings of the State Court itself. The Supreme Court has held, however, that where a defendant was prevented by fraud from setting up in a State Court a meritorious defense which he had, the Federal Court may, in spite of the statute, enjoin the enforcement of such judgment provided there is the necessary diversity of citizenship between the parties.²

The Circuit Court of Appeals for the Eighth Circuit in a very able opinion has held that the exception applies as well to cases where the defendant was prevented from making his defense by accident or mistake.³

In that case the defendant in the State Court suit was a non-resident corporation. In accordance with the laws of the State, the State Auditor had been appointed its attorney to accept service of process. Suit had been brought against it upon a claim as to which it had a perfect and conclusive defense. Process was served on the State Auditor and he, by mistake, failed to notify the defendant of the suit. It knew nothing about it and of course never appeared. Judgment was given against it for \$7,800. Some years later it learned of the judgment. It brought suit in the United States Circuit Court to enjoin the enforcement of it. It was

¹ Dietzsch vs. Huidekoper, 103 U. S. 496.

² Central National Bank vs. Stevens, 169 U. S. 464.

³ Marshall vs. Holmes, 141 U. S. 589.

⁴ National Surety Co. vs. State Bank, 120 Fed. 593.

held that the Court had jurisdiction to grant the relief prayed.

366. Ancillary Jurisdiction in Aid of Another Federal Court.—In addition to the jurisdiction of a District Court over proceedings which are ancillary to other proceedings properly pending before that Court, there is still another kind of ancillary jurisdiction which it is sometimes called on to exercise. The occasion for it usually arises where property involved in litigation is found in two or more districts.

367. Do.—Ancillary Receivers.—It is especially important to exercise ancillary jurisdiction when it becomes necessary to appoint a receiver for property. The powers of a receiver do not ordinarily extend beyond the jurisdiction of the Court which appoints him. Where receivers are needed for a great railroad corporation, such as the Northern Pacific Railroad, it becomes necessary to obtain appointments from the Court in each district through which the road runs or in which it has property. Such a corporation may have property lying in a number of different districts in the same circuit. Section 56 of the Judicial Code makes provision for such a case. It declares that the appointment of a receiver in one district of the circuit and his qualification gives him “full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit, subject, however, to the disapproval of such order within thirty days thereafter by the Circuit Court of Appeals for such circuit, or by a Circuit Judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval.” If it is disapproved the receiver is divested of jurisdiction over all the property not lying or being within the State in which the suit was brought. The section also requires that within ten days after the filing of the order in the District Court of original jurisdiction, a duly certified copy of the bill and of the order of appointment shall be filed in the District Court of each district of the circuit in which any of the property lies.

It is declared that where a receiver is appointed under the authority so given, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district. Orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

368. Do.—Ancillary Receivers When Property Lies in Different Circuits.—But in some cases, as where a large railroad system is involved, the property may not only be in several districts of one circuit but in a number of different circuits. In such cases an ancillary bill should be filed in some district of each circuit in which the property is found. Usually the judge of the Court of such district appoints as ancillary receivers the same persons as were appointed original receivers. All orders are obtained from the Court of original jurisdiction. Such of them as apply to the property in any other circuit are obtained also in the proper District Court of the latter circuit.

369. Do.—Administration Under Ancillary Receiverships.—The assets realized in a district in which the jurisdiction has been ancillary, after paying the necessary expenses and Court costs in that district, and making proper reservations to protect the rights and liens of the creditors living in it, are turned over to the Court of primary jurisdiction for distribution among the general creditors.

370. Do.—Court of Ancillary Jurisdiction May Select its Own Receivers.—There is no binding obligation, however, upon the District Court of another circuit, when application is made to exercise this ancillary jurisdiction, to do so, in the precise manner which is usual and most convenient. If it sees fit it can decline to appoint receivers at all, or it can, and it sometimes does, appoint other receivers, or having appointed in the first instance the same receivers as those of the Court of primary jurisdiction, it may afterwards remove them and appoint others in their place.

371. Do.—Ordinarily Expedient That Original Receivers Be Made Ancillary.—Sometimes very serious difficulties result from these varying views of different Courts. For example—In 1893 the Northern Pacific Railroad Company, which then operated a railroad in seven States and eight or nine Federal districts, was put in the hands of receivers on a bill filed in the Circuit Court of the United States for the Eastern District of Wisconsin. The same receivers were appointed in the other districts. Subsequently, however, the Circuit Courts for the Districts of Washington and Idaho revoked these appointments and appointed other persons. This led to so much confusion and trouble that, after various other efforts had been made to restore the control of the properties to a single set of hands, all parties agreed to submit the matter to the four justices of the Supreme Court who were assigned to the four circuits in which the receivers had been appointed. Those four judges by agreement sat to hear the case in Washington, outside of any of the circuits, and decided that the Circuit Court for the Eastern District of Wisconsin should be regarded as the Court of primary jurisdiction, and that the receivers appointed by it should be appointed in all the other districts. The Court said:

“We are of opinion that proceedings to foreclose a mortgage placed by a railroad company upon its lines extending through more than one district should, to the end that the mortgaged property may be effectively administered, be commenced in the Circuit Court of the district in which the principal operating offices are situated, and in which there is some material part of the railroad embraced by the mortgage; that such court should be the court of primary jurisdiction and of principal decree, and the administration of the property in the Circuit Courts of the other districts should be ancillary thereto.”

Now it so happened that in this case the principal offices of the company were in the District of Minnesota, and there was some question whether it actually operated any railroad in the Eastern District of Wisconsin, for it had leased all

the property it there owned to another company for ninety-nine years. The judges, however, concluded, that because in point of fact the primary jurisdiction had been taken by the Court for the Eastern District of Wisconsin and its action in the matter had been acquiesced in for sometime thereafter, it was expedient to regard the Eastern District of Wisconsin as the primary district.¹

¹ Farmers Loan & Trust Co. vs. Northern Pacific R. R. Co., 72 Fed. 30.

CHAPTER XIII.

HABEAS CORPUS.

372. Power of Federal Courts and Judges to Issue Writ of Habeas Corpus.—Federal Courts and Federal Judges may under some circumstances issue writs of *habeas corpus*.

It has been stated that the District Court has no power under the first clause of section 24 to issue the writ, because no money or money's worth is in controversy; but by sections 751 and 752 of the Revised Statutes, which were not repealed by the enactment of the Judicial Code, the Supreme Court and the District Courts, and their several Justices and Judges within their respective jurisdictions, have power to grant it for the purpose of inquiring into the cause of restraint of liberty.

373. Federal Court May Issue Writ Only When Petitioner is in Custody Under Color of Federal Authority or in Violation of Federal Right.—The writ, it is provided by section 753, "shall in no case extend to a prisoner in jail unless where he is in custody (1) under or by color of the authority of the United States, or is committed for trial before some Court thereof, or (2) is in custody for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a Court or judge thereof, or (3) is in custody in violation of the Constitution or of a law or treaty of the United States, or (4) being a subject or citizen of a foreign State and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign State or under color thereof, the validity and effect whereof depends upon the law of nations, or (5) unless it is necessary to bring the prisoner into Court to testify."

374. Supreme Court, Except in Connection With Cases in Which it Has Original Jurisdiction, May Issue the Writ Only in the Nature of an Appellate Proceeding.—To prevent misapprehension it should be mentioned that the Supreme Court, except in connection with the limited class of cases over which it is given by the Constitution original jurisdiction, may issue the writ only when the questions raised are of an appellate nature.

A certain member of the City Council of Cincinnati who, as such, was by the State law a judge of election, was indicted in the United States Court under the Federal election laws, now repealed, for an offense committed at a congressional election. He was sentenced to be imprisoned for twelve months and to pay a fine of \$200 and costs. He applied for a writ of *habeas corpus* to Mr. JUSTICE STRONG of the Supreme Court, who made the same returnable before him at the Catskill Mountain House, in the State of New York. On the petitioner being brought before him, he made an order transferring the hearing of the cause into the Supreme Court, and fixing such hearing for the second Tuesday of October, 1879. He admitted the prisoner meanwhile to bail. The point was made by the Government that the matter could not be considered by the Supreme Court, as that Court had no original jurisdiction. The Court said:—

“It is clear that the writ, whether acted upon by the Justice who issued it or by this court, would in fact require a revision of the action of the Circuit Court by which the petitioner was committed, and such revision would necessarily be appellate in its character. This appellate character of the proceeding attaches to a large portion of cases on *habeas corpus*, whether issued by a single Judge or by a Court.” * * * “The Justice who issued it could undoubtedly have disposed of the case himself, though not at the time, within his own circuit. A Justice of this court can exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the Justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the

case here for consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did.”¹

375. Habeas Corpus is a Civil and Not a Criminal Writ.—The writ of *habeas corpus* is a civil, and not a criminal procedure. The petitioner asserts his civil right of personal liberty against the respondent who is holding him in custody, and the inquiry is into his right to the liberty for which he asks. A person convicted of murder and sentenced to death by the Supreme Court of the District of Columbia applied for a writ of *habeas corpus* to the Supreme Court of the United States. The latter held that its jurisdiction depended not upon the general statute already mentioned, but upon some legislation local to the District of Columbia, which limited the jurisdiction of the Supreme Court on appeals from the highest Court of the District to civil cases in which the matter in dispute, exclusive of costs, exceeded the sum of \$5,000. In order to give the Supreme Court jurisdiction under the statute the matter in dispute had to be money or some right the value of which in money could be calculated or ascertained, and as the matter in dispute had no money value, there was no appeal.¹

376. Habeas Corpus May Not Serve Purpose of Writ of Error.—It has been decided over and over again that this writ cannot be used as a writ of error. If the Court or tribunal below had jurisdiction over the subject matter and to enter the special order complained of, then the defendant's remedy, if any, must be sought by appeal or writ of error.¹

377. Federal Courts Issue Writ Only When Federal Question is Involved.—The Federal Courts, because they are Federal Courts, on petition for the writ of *habeas corpus*

¹ *Ex parte Clarke*, 100 U. S. 399.

² *Cross vs. Burke*, 146 U. S. 82.

³ *Charlton vs. Kelly*, 229 U. S. 456.

or a return thereto, take cognizance of such questions only as arise under the Constitution, treaties or laws of the United States, or in connection with the proceedings of the United States Courts, or of Federal officers in their official capacity. Since the passage of the Fourteenth Amendment, which declares that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, repeated attempts have been made to get the Federal Courts to exercise general powers of jail delivery of criminals arrested, indicted or convicted under the State laws. The theory advanced is that the law under which the petitioner is arrested or prosecuted was not validly passed by the State Legislature, or is not constitutional or does not mean what the State authority says it does, and that consequently he has been deprived of his liberty without due process of law or has been denied the equal protection of the laws.

Such was the case of *In re Duncan*.¹ Duncan was a convicted murderer. He applied to the United States Circuit Court for the Western District of Texas for a writ of *habeas corpus*, averring, among other things, that the pretended law under which he was convicted was not a law at all, as it had not been read on the number of days and in the manner required by the Constitution of Texas; that it had not been enrolled, etc.; that the judges of the Texas Court were interested in upholding the law, because the same statute fixed their salaries, etc. The Supreme Court said:—

“The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction.”

¹ 139 U. S. 449.

378. Federal Court Will Not Always Issue Writ Even Where Federal Question is Involved.—Ordinarily, even if there is a Federal question involved, the rule of the Federal Courts is not to interfere until the highest Court of the State that can consider the question has finally passed on it and has decided it adversely to the claim which the prisoner sets up under the Constitution, laws or treaties of the United States. At that stage he can always have his remedy by writ of error to the Supreme Court. To this policy of non-interference there are some exceptions. For example, in the famous case of *Neagle*, which has been heretofore mentioned, the Supreme Court interfered to discharge him from custody before he was tried by the California Court. It was felt that the obligation resting upon the United States to protect the lives of its judges from assaults committed upon them, because of the manner in which they discharged their official duties was so imperative that the Federal officials who gave this protection should in their turn, so soon as any proceedings were taken against them, be defended to the full power of the Federal Government.

379. Federal Courts Will Issue Writ to Protect Federal Jurisdiction.—Somewhat similar principles controlled the action of the Court in *In re Loney*.¹ Loney, in the City of Richmond, had testified in a case of a contested election for a seat in the House of Representatives of the United States. He was charged before a State magistrate with having perjured himself in the testimony so given. He was arrested by the State authorities. He applied to the Circuit Court of the United States for the Eastern District of Virginia for a writ of *habeas corpus*. He was discharged by that Court and the respondent appealed to the Supreme Court of the United States. The latter said:

“The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the Government in whose tribunals that proceeding is

¹ 134 U. S. 372.

had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the State courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice." * * * "The Courts of Virginia having no jurisdiction of the matter of the charge on which the prisoner was arrested, and he being in custody, in violation of the Constitution and laws of the United States, for an act done in pursuance of those laws by testifying in the case of a contested election of a member of Congress, law and justice required that he should be discharged from such custody, and he was rightly so discharged by the Circuit Court on writ of *habeas corpus*."

In 1907 the Legislature of North Carolina passed certain Acts providing for radical reductions in the fares of passengers on railroads. The Southern Railroad Company applied to the United States Court to enjoin their enforcement on the ground that they deprived it of its property, the prescribed rates being so low as in their practical effect to be confiscatory. JUDGE PRITCHARD granted the injunction. In his order he directed that the railroad should give bond in a large sum to repay the excess fares, if upon final hearing the validity of the State legislation was upheld. Each passenger agent in selling a ticket was required to give the purchaser a coupon for the difference between the old fare and that which the Act fixed. The ticket agent at Asheville continued in accordance with the order to sell tickets at the former rate issuing the coupons to their purchasers. He was arrested by the State authorities, tried, convicted, and sentenced to thirty days in the chain gang. JUDGE PRITCHARD released him on *habeas corpus* and the Supreme Court affirmed the action. It said the agent was held in custody

ly the State authorities for an act done pursuant to an order, process or decree of a Court or judge of the United States.²

380. Federal Courts Will Issue Writ to Protect Federal Officers in Discharge of Their Duties.—In the case of *Boske vs. Comingore*,¹ the Supreme Court upheld the action of a District Court of the United States in discharging on *habeas corpus* a United States Collector of Internal Revenue who had been committed for contempt of a State Court in refusing to produce records of his office. He had acted by direction of his official superiors given under the authority of a valid law of the United States. The Court said:—

“When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relation with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority.” The Court added: “The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interests, and whose detention in prison by the State authorities might have interfered with the regular and orderly course of the business of the Department to which he belonged.”

In other words, while the Federal Courts have the power to release persons held in custody by State authorities, contrary to the Constitution or laws of the United States, they will

² *Hunter vs. Wood*, 209 U. S. 205.

¹ 177 U. S. 459.

ordinarily refuse to pass the order of discharge unless they feel that, if they do not, some great public interest will suffer or be imperiled, or, in exceptional cases, that great private injustice and hardship will result.

381. An Alleged Fugitive From the Justice of One State May Have Federal Writ to Inquire Into the Lawfulness of his Detention.—One State may in its Courts begin a prosecution against “A.” He may at the time be in another State. The Governor of the prosecuting State makes requisition upon the Governor of the other for his return as a fugitive from justice. The latter Governor may issue his warrant for the delivery of “A” to the agent of the prosecuting State. “A” may deny that he is a fugitive from the justice of the demanding State, or he may, perhaps, assert that the proceedings under which he is held in custody are for other reasons so irregular or improper as to afford no legal ground for his detention. If he wishes he may apply for a writ of *habeas corpus* to a United States District Court or to a Federal judge. Upon what does his right to do so rest? He is not in the custody of any Federal official or under any process of its Courts. He has not been charged with any violation of its laws. It is possible that the proceedings against him may be so wanting in all regularity that his detention under them may be without due process of law, and therefore in violation of the Fourteenth Amendment; but, as has been stated, it is, even under such circumstances, ordinarily the policy of the Federal Court to avoid precipitate interference with the action of the State authorities. Proceedings for interstate extradition are, however, not in legal theory taken altogether or even principally under State laws. The duty to return fugitives from the justice of other States is imposed by the Federal Constitution upon each of the States. Congress has power to provide by law the machinery for executing this constitutional duty. It has done so. A prisoner held for delivery by one State to another is, in a sense, in custody under color of the Constitution and laws of the United States. The Federal Courts, therefore,

may and should inquire into the regularity of his detention.¹ It is, however, only in a limited sense that the prisoner is held under color of a Federal law. If he were in custody of any officer of the United States, or were detained under any process from its Courts, they, and they alone, could inquire into the lawfulness of his detention as has been more fully stated elsewhere;² but being in custody of State officers, State Courts and State judges have concurrent jurisdiction to issue the writ. He may accordingly invoke the protection of either the State or the Federal Courts. If in the former he asserts that he is held in violation of some right given him by the Constitution or statutes of the United States, and the decision is against him, he may, after having fought the case to and through the highest Court of the State to which he may carry it, appeal to the Supreme Court of the United States.

The scope of the inquiry of either State or Federal Courts in such cases is quite limited. They may not ordinarily review the Governor's decision on any disputed question upon which it was his duty to pass, and upon which there was conflicting evidence.³

Whether the person demanded is substantially charged with a crime or not, is a question of law, and open, upon the face of the papers, to judicial inquiry; yet upon an application for a discharge under a writ of *habeas corpus*, the indictment will not be nicely scrutinized for possible technical defects. It is sufficient if it shows that the defendant is substantially charged with the crime; for the case is not to be tried on *habeas corpus*.⁴

The two cases cited show that the petitioner ought not to be returned to the demanding State if it be clearly established that he was not physically present in that State at any time at which he did anything towards effectuating the crime charged against him, but that it is not necessary to his return that he shall have been present in the State when the offense was actually consummated.

¹ *Ex parte Thaw*, 214 Fed. 423.

² Sec. 130, *supra*.

³ *Hyatt vs. Corkran*, 188 U. S. 711.

⁴ *Strassheim vs. Daily*, 221 U. S. 282.

382. The Petition for the Writ.—The Revised Statutes prescribe that the application for the writ shall be made by complaint in writing signed by the person for whose benefit it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint are to be verified by the oath of the person making the application. It is further provided that the Court, justice or judge to whom the application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the applicant is not entitled thereto.

383. Federal Court May Issue Rule to Show Cause Why Writ Should Not Issue.—A practice, sanctioned by the Supreme Court, has grown up whereby in many cases the Court, instead of granting the writ, requires the person, to whom it would otherwise be issued, to show cause why it should not be granted.

An application was made to the Supreme Court for a writ of *habeas corpus*, alleging that the petitioners were confined in the jail of Fulton County, Georgia, in the custody of the United States Marshal for the Northern District of Georgia, under sentence of the Circuit Court for that district, and that the trial, conviction and sentence under which they were held were illegal, null and void. On the filing of the petition, the Court issued a rule on the Marshal, or on any person in whose custody the prisoners might be found, to show cause why the writ should not issue for their release. The superintendent of the Albany penitentiary, in the State of New York, made return that the prisoners had been sentenced to that institution for two years and were then confined there. A transcript of the proceedings of the Circuit Court for the Northern District of Georgia was annexed. The Supreme Court said:—

“As this return is precisely the same that the superintendent would make if the writ of *habeas corpus* had been served on him, the court here can determine the right of the prisoners to be released on this rule to show

cause, as correctly and with more convenience in the administration of justice, than if the prisoners were present under the writ in the custody of the superintendent; and such is the practice of this court.”¹

This method of procedure is obviously convenient, especially when, as often happens, the Court is sitting at some considerable distance from the place at which the prisoner is confined. Moreover, where the petitioner is in the custody of State officials, it is more courteous to the State to lay such a rule than to issue the writ in the first instance.

The petition may very well itself show, and indeed very often does show, that the applicant is not entitled to release. Where this appears there is no necessity for issuing the writ. The petitioner cannot retry his case. He cannot in this collateral way attack the proceedings of the Court by which he was indicted or under the order of which he is held in custody, but he can show facts which do not contradict the record, if they are material to the question he wishes to raise.

384. Appeals in Habeas Corpus Cases.—From the grant or refusal of a writ of *habeas corpus* an appeal lies. Whether it should be taken to the Circuit Court of Appeals, or directly to the Supreme Court, depends upon the kind of question raised by the proceeding. If such question belongs to the class which goes directly to the Supreme Court, the appeal from the *habeas corpus* proceeding will take the same course; while if the issue passed upon is of the kind over which appellate jurisdiction is given to the Circuit Court of Appeals, the appeal from the grant or refusal of the writ will be taken to that Court.

385. Habeas Corpus ad Testificandum.—A Federal Court may issue the writ of *habeas corpus ad testificandum* to bring into Court a person whose testimony is required in a cause depending before it, although he is at the time in lawful custody, either State or Federal. He is, of course, returned to that custody so soon as the occasion for his presence in the Federal Court has passed.

¹ *Ex parte Yarborough*, 110 U. S. 651

CHAPTER XIV.

CIVIL PROCEDURE OF THE FEDERAL COURTS WHEN SITTING AS COURTS OF LAW.

386. Civil Procedure as Distinguished From Civil Jurisdiction of Federal Courts.—The preceding chapters have treated of those cases which may be instituted in the Federal Courts, or which may be removed into them; that is to say, of the jurisdiction of those Courts. Something has been said about their procedure when dealing with criminal charges. Now attention must be given to the way in which they handle those civil cases which are properly brought in them or which are removed to them from State Courts. In other words, their civil procedure as distinguished from their civil jurisdiction is to be discussed.

387. Pleading in Federal Courts Should Affirmatively Show Existence of Jurisdictional Facts.—As has already been pointed out, it is necessary, in the Federal Courts, that the record shall affirmatively show that the Court has jurisdiction of the controversy. It follows that the plaintiff should distinctly allege such facts, as, if true, will confer jurisdiction upon the Court. This rule was early established and has been consistently adhered to. It is a requirement to which, ordinarily, pleading in the State Courts need not conform. Formerly it was enforced with great rigidity, as, for example, when the Supreme Court dismissed for want of jurisdiction, the case in which the defendant in the body of the bill was described merely as of Philadelphia, although in its caption he had been spoken of as a citizen of Pennsylvania.¹

388. Distinction Between Law and Equity.—In some States the distinction between the Federal and State

¹ Jackson vs. Ashton, 8 Peters, 148.

procedure is more marked than it is in Maryland. In many, if not in most, of the States of the Union, the larger part of the distinctions between law and equity have been broken down. Probably it is only in a minority of them that separate Courts of equity still exist.

The distinction between law and equity and between Courts of law and of equity, is still rigidly maintained in the Federal tribunals.

As has previously been pointed out, the latter understands a case in equity to be a case of the same kind, class and general nature as those proceedings which were held, by the practice of the English High Court of Chancery in 1789, to be of equitable cognizance.

389. In the Federal Appellate Courts it is Sufficient if the Record Anywhere Affirmatively Shows Jurisdiction in the Lower Court.—It is, however, well settled that the appellate Court, in determining whether it sufficiently appears that the Court of first instance had jurisdiction, does not restrict its examination to those pleadings in which jurisdictional facts should properly be alleged and ordinarily are. It is sufficient after verdict or decree below, that they distinctly and affirmatively appear somewhere in the record.¹ Appear, however, they must, and that clearly, in what is properly a part of the record; it is not enough that from something therein, it may be gathered, that they probably exist. They must be unambiguously set forth.²

390. Averments of Jurisdictional Allegations Inadvertently Omitted May Be Inserted by Amendment Even After Final Judgment or Decree.—Until within the last few decades, the Supreme Court, when it found that the record did not disclose jurisdiction, directed that the case should be dismissed¹ unless both parties agreed to amend the

¹ *Railway Co. vs. Ramsey*, 22 Wall. 322.

² *Robertson vs. Cease*, 97 U. S. 646.

¹ *Jackson vs. Ashton*, 8 Peters, 148.

record so as to show it.² To take such course was to inflict a grievous punishment upon the client for the mistake of his counsel; a punishment, moreover, which was not required by any consideration of public policy.

At present under such circumstances, the established practice of the Supreme Court is to remand the case to the District Court with directions to allow the plaintiff to amend his pleadings so as to show the existence of the necessary jurisdictional requirements; or if both parties unite in the request, the Supreme Court will itself permit the amendment and retain the case.³ Nor are the consequences of a remand with leave to amend necessarily very serious. If, after the amendment has been made, the defendant does not traverse the existence of the jurisdictional facts, or if, having traversed them, they are proved, it has been held that without trying the case *de nova* a judgment or decree on the merits may be entered upon the old verdict or findings of fact.⁴

391. Legal and Equitable Procedure May Not Be Intermingled.—The rule that legal and equitable procedure may not be intermingled has been rigidly adhered to. Texas, from the time of its admission into the Union, had no separate Courts of equity and no distinct equity procedure.

A citizen of New York brought suit in the United States Court for the District of Texas against a citizen of Texas by filing a petition in that Court in which he described himself as lawfully possessed of four negroes, slaves for life, to wit, Billy, a negro man of dark complexion, aged about 12 years, of the value of \$500; Lindsay, a negro man of dark complexion, aged 22 years, of the value of \$1,000; Betsy, a mulatto woman of light complexion, aged about 30 years, and of the value of \$800, and Alexander, a boy of very light

² *Hodgson vs. Bowerbank*, 5 Cranch, 303.

³ *Kennedy vs. Georgia State Bank*, 8 How. 586.

⁴ *Grand Trunk Western Ry. Co. vs. Reddick*, 160 Fed. 898; *Parker Washington Co. vs. Cramer*, 201 Fed. 878.

complexion, aged about 4 years, and of \$400 value. His petition went on to say that he casually lost the same out of his possession and that they came into the possession of the defendant by finding, and that the defendant, though often requested so to do, had refused to deliver them to the plaintiff. The plaintiff alleged his damage to be \$5,000. Thus far the petition was strictly a declaration in trover. It contained a prayer for process and that upon trial of the cause "your petitioner may have a judgment in specie for the said negroes, together with damages for the detention of the same and also the costs of suit," and then ended with a prayer for such other and further relief as should be in accordance with right and justice. In other words, to a common law declaration in trover were annexed prayers for equitable relief.

The defendant pleaded that the title of these negroes had been arbitrated between the plaintiff and the person under whom defendant claimed them and had been decided in favor of the latter. The plaintiff in reply alleged that the award was not binding. The jury found a verdict for the plaintiff for \$1,200, the value of the negro slaves in the suit, with six and a quarter cents damages. The plaintiff then released the judgment for \$1,200 and the Court ordered that the defendant return to the plaintiff the four negroes and pay him six and a quarter cents damages and costs of suit. The defendant appealed to the Supreme Court. CHIEF JUSTICE TANEY delivered the decision; he said:—

"The common law has been adopted in Texas, but the forms and rules of pleading in common law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or as a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the Courts of the United States. And although the forms of proceedings and practice in the State courts have

been adopted in the district Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed (under the authority of the Act of August 23, 1842), regulating proceedings in equity in courts of the United States. There is nothing in these proceedings which resembles a bill or answer in equity according to the rules prescribed by this court, nor any evidence stated upon which a decree in equity could be revised in an appellate court. Nor was any equitable title set up by” * * * “the plaintiff in the court below. It was a suit at law to try a legal title.” * * * “Here the matter in issue was the property in these negroes. The verdict does not find that they are the property of the plaintiff or the defendant, but finds for the plaintiff their value, which was not an issue. It ought, therefore, to have been set aside upon motion of either party, as no judgment could be lawfully entered upon it.”¹

392. In Federal Courts Strictly Equitable Defenses Cannot Be Made at Law.—Many defenses can now be made directly at law which formerly could have been made only in equity. Where the change in the common law is due to decisions of the Courts holding in effect that the earlier rulings prohibiting such defenses were erroneous, there is in principle no reason why they may not now be made in the Courts of the United States. It would not be safe to affirm without a very thorough search and analysis of all the decisions of the Supreme Court and of the subordinate Federal tribunals, that none of the legislative extensions of the power of the parties to set up equitable defenses in an action of law

¹ *Bennett vs. Butterworth*, 11 How. 669; *Fenn vs. Holme*, 21 How. 481.

will be recognized in the Federal Courts. Still the general principle that in those Courts equitable and legal rights and remedies are to be kept separate and enforced in separate proceedings is clearly recognized and on the wholly firmly adhered to.¹

393. Federal Legal Procedure.—Attention will be first given to the practice and procedure on the law side of the Federal Courts. It is expedient that the differences between the procedure of the Federal Court sitting in any particular State and the State Courts therein shall be few. The more nearly they are alike, the more likely it is that justice will be furthered.

The great diversity among the several States themselves in matters of pleading and practice is unfortunate. It has been thought that greater uniformity and greater simplicity and despatch might be brought about if Congress authorized the Supreme Court to prescribe rules governing pleading and practice in the Federal Courts on their law sided as it now does with reference to their equitable jurisdiction. The adoption by the several States of these Federal rules, would result in uniformity of procedure, not only between the Courts of the States and of the United States, but among the former as well.

394. Federal Process Prior to Conformity Act.—Up to this time the problem has been approached from the other side. As early as 1789 Congress made temporary provision for assimilating Federal to State process. In 1792 a permanent statute on the subject was enacted. By it the process in the Federal Courts was to be the same in each State, respectively, as had in 1789 been used by the highest Courts of the latter. Many years afterwards what is now known as the Conformity Act was adopted.

395. The Conformity Act.—That enactment prescribes that the practice, pleading, forms and modes of proceeding in

¹ Platte Valley Cattle Co. vs. Bosserman-Gates Live Stock & Loan Co., 202 Fed. 693.

civil causes, other than those in equity and admiralty, in the Federal Courts of original jurisdiction shall conform as nearly as may be to the practice, pleading, forms and modes of proceeding existing at the time in like causes in the Courts of record of the State in which the District Courts are held. any rule of Court to the contrary notwithstanding.

The Supreme Court said:

"The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings, forms and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it."¹

396. Conformity Statute Does Not Affect Province of Judge and Jury.—By the law of Illinois a judge is required to give all his instructions in writing, and he may not otherwise add to or modify them. The jury are permitted to take the written instructions with them to the jury room. In *Nudd vs. Burrows* (*supra*), one of the parties had requested the judge to give his charge and all of it in writing and to refrain, as the Illinois judges are required to do, from any comment on the facts. The Supreme Court, after using the language quoted in the preceding section, said:—

"The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction. We see nothing in the Act to warrant the conclusion that it was intended to have such an application. If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by

¹ *Nudd vs. Burrows*, 91 U. S. 441.

the common law, were largely trenched upon." * * *
"The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context."

397. Conformity to Be Only as Near as May Be.—

In a subsequent case the Court pointed out that

"the conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals. While the act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory."¹

398. Conformity Statute and Rules of Court.—

A rule of the United States Court for the District of Colorado provided that the defendant should appear, demur or answer within ten days from the day of service, if such service be made within the county from which the summons is issued. A subsequent statute of Colorado extended the time to twenty days. A defendant appeared within ten days and moved to quash the return on the ground that the process was not the process required by the Act of Congress, in that it did not give the defendant the number of days in which to appear and answer or demur accorded by the State law. The Supreme Court held that the summons was in proper form and said:—

"We think * * * while it was the purpose of Congress to bring about a general uniformity in Federal and State proceedings in civil cases, and to confer upon suitors in Courts of the United States the advantages of remedies provided by State legislation, yet that it

¹ Indianapolis R. R. Co. vs. Horst, 93 U. S. 301.

was also the intention to reach such uniformity often largely through the discretion of the Federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.”¹

Any other construction would involve an unconstitutional delegation of congressional power to State legislatures.

399. The Conformity Statute Yields to the Constitution and to Any Specific Federal Statute.—The separation of law and equity, and the requirement that in trials at common law when a sum greater than \$20 is at issue, either party is entitled to a trial by jury, by which is meant a trial conducted substantially as jury trials were conducted at the time of the adoption of the Constitution, necessarily in many features make radical distinctions between the State and Federal procedure. Nor will the Courts assume that Congress by the Conformity Act intended to repeal or change any specific provision, it had already made for the government of the procedure of the Federal Courts, much less can it be supposed that Congress by enacting it attempted to tie its hands for the future. It follows that the Conformity Act must yield to the other legislation of Congress.¹

400. The Conformity Act Does Not Adopt for Federal Courts State Statutes as to Service of Process Inconsistent With the General Principles of Jurisprudence.—It sometimes happens that State statutes go very far in attempting to extend the jurisdiction of their Courts over persons who, according to the general principles of jurisprudence, are not subject thereto. This tendency is especially manifested with reference to corporations. In some States a corporation may be bound by service on one of its agents or employees found in the State, although it was not incor-

¹ *Shepard vs. Adams*, 168 U. S. 625.

¹ *Southern Pacific Co. vs. Denton*, 146 U. S. 202.

porated therein and is not at the time of such service doing business within it, either generally or specially. The Conformity Statute does not require or permit the Federal Courts to hold such service valid when under general principles of jurisprudence it would not have been. This rule applies as well to cases instituted in the United States Courts as to those brought in the State tribunals and thence removed to the Federal.¹

401. Conformity Statute Does Not Control Mode of Proof in Federal Courts.—Congress has prescribed the mode of proof in actions in the Federal Courts. It has said that this shall be by the oral examination of witnesses in open Court and has provided that, under certain specific exceptional circumstances, depositions taken elsewhere may be admitted in evidence. It is not in the power of State legislation to add to or withdraw from those exceptions. Congress, it is true, has provided that in addition to the other modes of taking depositions prescribed by the Revised Statutes, it shall be lawful to take them in the manner fixed by State law. This permission, however, relates merely to the way in which a deposition may be taken when such deposition is under the Federal law admissible at all. It does not extend the cases in which depositions may be admitted.¹

402. Whether a Plaintiff in a Personal Injury Case May Be Required to Submit to Physical Examination Depends on the State Law.—At common law the Court had no power to require a plaintiff in a personal injury case to submit to a physical examination.¹

A statute of New Jersey authorized the Court in a litigation of that character, upon the application of the defendant to order one. The question arose as to whether the United States Court, sitting in that State, could do the like. The Supreme Court held that the statute was one of the laws of the State which by section 721 of the

¹ *Mechanical Appliance Co. vs. Castleman*, 215 U. S. 437.

¹ *Hanks Dental Assn. vs. Tooth Crown Co.*, 194 U. S. 310.

¹ *Union Pacific Ry. Co. vs. Botsford*, 141 U. S. 250.

Revised Statutes, as we shall later see, were to be regarded as a rule of decision of the Courts of the United States when not in conflict with the Federal Constitution, treaties or statutes; and that there is nothing in the laws of the United States to prohibit such an examination, when made at the trial, although under them it could not have been required against the plaintiff's consent in advance thereof.²

403. State Statutes or Usages as to Continuances Are Not Binding on the Federal Courts.—The statute law of Texas under certain circumstances gives a party an absolute right to at least one continuance. The defendant in a case depending before the United States Court sitting in Texas sought to avail itself of this privilege. The Circuit Court of Appeals for the Fifth Circuit held that such State law was not binding on the Federal Courts, and that whether a continuance should or should not be granted rested in the sound discretion of the trial judge.¹

404. Amendment of Pleadings Freely Permitted.—The framers of the original Judiciary Act of 1789 were far ahead of their contemporaries in the liberality of their provisions for amendment. Indeed it is doubtful whether in any modern State Code there is any more liberal and enlightened provision for amendment than was then made. In most of the States, even today, the right to correct errors in pleadings is by no means as extensive as it is under this Federal law passed one hundred and twenty-five years ago. The provisions which formed section 32 of the Judiciary Act of 1789 are now codified as section 954 of the Revised Statutes. They direct the Federal Courts in civil cases to ignore all defects of form except those attacked by demurrer and substantially assigned in the demurrer itself as grounds therefor. The Court is, in the broadest way, authorized at any time to permit amendments in the process or pleadings upon such conditions as it shall in its discretion, and by its rule, prescribe. It follows that any amendments which would

² Camden & Suburban Ry. Co. vs. Stetson, 177 U. S. 172.

¹ Texas & P. Ry. Co. vs. Nelson, 50 Fed. 814.

be allowable under State practice will be permitted by the Federal Court unless, perhaps, where their effect would be to violate some of the cardinal rules governing the jurisdiction or procedure of the Federal Courts. On the other hand, no State statute or practice can limit the power of the Federal Courts to permit amendments. Thus—

The California form of Lord Campbell's Act requires that the suit shall be brought by the legal representatives of the decedent for his next of kin.

In the United States Court for the Northern District of California such a suit was brought by the father of the deceased in his own name. He was the next of kin. The error was not discovered until after the time in which a new suit could be brought. It was held that he should be allowed to amend his old action in such manner as to substitute the administrator of the deceased as party plaintiff for the father.¹ It was immaterial that such substitution would not have been permitted in the State Courts.

405. Federal and State Pleading Nearly Identical—Federal and State Practice Similar.—For practical purposes it is sufficiently accurate to say that in most matters of pleading the procedure on the law side of the United States Courts, sitting in any State, is very nearly the same as in the Courts of that commonwealth, except that in the Federal tribunals the existence of facts necessary to jurisdiction must be averred and the line dividing equitable from legal remedies must be preserved. Where it comes to what are more strictly matters of practice, the procedure of the United States Courts is in many respects identical with that of the State Courts, and in almost all others substantially similar thereto. In all such matters, however, the prudent practitioner will always carefully examine the Federal Statutes and the rules of the particular United States Court in which he is practicing.

¹ Reardon vs. Balaklala Consolidated Copper Co., 193 Fed. 189.

406. In Common Law States a General Issue Plea Does Not Traverse the Jurisdictional Averments.—In States which retain the common law system of pleading the general issue plea does not traverse the jurisdictional averments of the declaration. In accordance with the Conformity Statute, if in the Federal Court sitting in such a State, the plaintiff alleges in his declaration the necessary jurisdictional facts, and the defendant does not traverse them by special plea in abatement, they are assumed to be true, although there may have been no evidence upon the subject.¹ If in the course of the trial it should affirmatively appear that they are untrue it will be the statutory duty of the Court to dismiss the case, as one not really within its jurisdiction.

In Code States in which the general denial of the answer traverses the jurisdictional facts, the plaintiff must prove them. In most of the States in which the code system of pleading prevails, it is not necessary to plead specially in abatement. A general denial in the answer of all the allegations of the declaration or complaint that are not admitted, puts the burden of proving them upon the plaintiff. In such States it has accordingly been held that unless the defendant by its answer admits the jurisdictional allegations, the plaintiff must prove them, and if he does not, judgment must be given against him.²

407. The Conformity Statute and the Local Codes of Maryland.—In Maryland we have separate codes for the City of Baltimore and for everyone of the twenty-three counties of the State. In Baltimore City, and in quite a number of the counties, there are local requirements with reference to the pleading and practice of the Courts differing from the provisions of the Code of Public General Laws.

¹ Sheppard vs. Graves, 14 How. 505; Steigleder vs. McQuesten, 198 U. S. 141.

² Roberts vs. Lewis, 144 U. S. 653; Lindsay-Bitton Live Stock Co. vs. Justice, 191 Fed. 163. The latter case overrules Hill vs. Walker, 167 Fed. 241, in which the whole subject and all the authorities are elaborately discussed.

The Act of Congress does not provide for the adoption of such local statutes.

408. Speedy Judgment Acts.—For example—the Speedy Judgment Act applies to Baltimore City. There are Acts, similar in purpose, but differing more or less in detail, in force in quite a number of the counties of the State. No one of these regulates the practice of the District Court of the United States for the District of Maryland. That practice is necessarily uniform throughout the district. Conformity to the State practice as near as may be, is brought about by a rule of Court adopting the Act effective in Baltimore City, with some modifications, the latter made in view of the fact that it is not quite fair to call on a defendant in Garrett or Worcester to plead in a clerk's office in Baltimore City quite so promptly as can reasonably be demanded of a resident of Baltimore.

The present rule of the United States Court for the District of Maryland allows the defendant to plead at any time before the next return day instead of limiting him to the fifteen days prescribed by the local law. Return days are the first Mondays of each month.

409. Common Law Trials With Jury Unless Waived.—Every common law trial in the Federal Courts is to a jury unless the parties otherwise agree. The agreement may be in writing or it may be by word of mouth. If it is not in writing, the right to a review of any ruling upon the admission or rejection of testimony or upon any other question growing out of the evidence, has been waived. The judgment of the Court is final. It has been held that the verbal agreement of the parties to submit the case to the Judge without a jury is as an agreement to abide by his arbitration.¹

The statute, however, provides that the parties may stipulate in writing to try the case before the Court without a jury. When this is done, exceptions may be taken and writs

¹ Bond vs. Dustin, 112 U. S. 604.

of error issued in the same manner as if the trial was before a jury.²

410. Qualifications of Jurors.—The qualifications of jurors in the United States Courts are those prescribed by the law of the State in which the Court is sitting. This rule has in some cases been very strictly enforced. Thus—a prisoner was indicted for having, while president of a national bank at Asheville, North Carolina, abstracted and embezzled its funds. His counsel and the district attorney stipulated in writing that the defendant might plead to the indictment, but should have the right on motion in arrest or for a new trial to take advantage of all matters and things available on motion to quash or by demurrer. After he had been four times tried and twice convicted, he attacked the competency of the Grand Jury by which he was indicted on the ground that two members of it were persons who had been assessed for taxes in North Carolina, but who had not paid their taxes for the preceding year, and who therefore were not, according to the State law, qualified to serve as jurors. The Circuit Court of Appeals held that this objection was fatal, reversed the judgment, and sent the case back with an order to quash the indictment. It was then about nine years since the offense had been committed. The Statute of Limitations was a complete bar to any further prosecution.¹

411. Competency of Witnesses in Civil Cases Determined by State Law.—By Act of June 29, 1906,¹ the competency of a witness to testify in any civil action, suit or proceeding in the Courts of the United States is to be determined by the laws of the State or Territory in which the Court is held. The Act by its terms applies to cases at law, in equity² and in admiralty.

² Revised Statutes, secs. 649, 700.

¹ Breese vs. United States, 143 Fed. 250.

¹ 34 Stat. 618.

² Rowland vs. Biesecker, 185 Fed. 515.

412. Court Determines the Law, the Jury the Facts.

—In civil as in criminal cases in the Federal Courts, the Court, that is to say, the judge, is the judge of the law; the jury of the facts. The judge is at liberty to comment upon the latter as fully as he sees fit, always provided he makes the jury understand that they are the final judges of the facts, and that they are at full liberty to disregard anything that he says on that subject, although they are absolutely bound to accept the law as laid down by him.

413. What Happens When Both Parties Ask for Instructed Verdict.

—Sometimes at the end of a trial by jury each party asks for an instructed verdict. In the Federal Courts when this is done it amounts to an agreement that there are no disputed questions of fact which could operate to deflect or control the question of law. It is a request that the Court find the facts. The parties are therefore concluded by the finding made by the Court and upon which the resulting instruction of law is given. In reviewing the action of the Court below, the Appellate Court is limited to the consideration of the correctness of the conclusion of law. If that be sound, and there be any evidence to support it, the judgment must be affirmed.¹

414. Exceptions to Charge Must Point Out Particular Error Complained of.—If counsel wish to reserve an exception of any value to the charge of the judge, it is necessary to point out to him specifically the very proposition alleged to be erroneous. The rule in this respect is the same in civil as in criminal cases.¹

415. Federal Courts Will Direct Verdicts in Cases in Which in Courts of Some States Such Direction Could Not Be Given.—In the Federal Courts when the evidence points so unmistakably to one conclusion that no fair-minded and intelligent man could come to any other,

¹ Beuttell vs. Magone, 157 U. S. 154.

¹ Sec. 108, *supra*.

the Court will instruct the jury to find a verdict accordingly. Such instruction will be given, although there may be a scintilla of evidence on the other side. The Court will direct a verdict for one party in those cases in which it would feel bound to set aside a verdict for the other.¹ This is contrary to the practice prevailing in some of the States.

Such direction has been given at the conclusion of the plaintiff's opening statement and before any evidence was offered. In the leading case on the subject the plaintiff, who had been consul general of Turkey, sued the Winchester Arms Co. for upwards of \$130,000, which he alleged to be due him as a commission on a large sale of rifles to the Turkish Government. From the opening statement of his counsel, it appeared that he had agreed for a commission to use his large personal influence with the Turkish officer detailed to select and buy the arms. The Court at once directed a verdict for the defendant. The Supreme Court said it was right in so doing.²

¹ Delaware, Lackawanna & Western R. R. Co. vs. Converse, 139 U. S. 469.

² Oscanyan vs. Arms Co., 103 U. S. 261.

CHAPTER XV.

PROCEDURE OF FEDERAL COURTS WHEN SITTING AS COURTS OF EQUITY.

416. General Equitable Procedure.—The procedure on the equity side of the Federal Courts requires separate consideration.

Originally equity had no jurisdiction in any case where a plain, adequate and complete remedy might be had at law. Such is still the rule in the Federal Courts.

417. Whether a Plaintiff Has a Remedy at Law Depends on Whether He Had Such Remedy in 1789.—Whether a plaintiff has such remedy at law depends not upon the state of the law at the time the suit is brought, but upon what it was when the Constitution drew the line of demarcation between legal and equitable jurisdiction. In many, perhaps in most, of the States, legislation has now provided legal remedies for many wrongs which formerly could have been redressed in Courts of equity alone. For example, the laws of Louisiana provide that, in a proceeding at law, a creditor may subject his debtor's property to the lien of his judgment, although before it was recovered the debtor, for the purpose of defrauding his creditors, conveyed such property to someone else. The existence of such a statute in no wise limits the equitable jurisdiction of the District Court of the United States for the District of Louisiana. In 1789 there existed no adequate and complete remedy at law, and the jurisdiction of equity to set aside such deeds and subject the property to the lien of the plaintiff's judgment was then thoroughly established.

418. Federal Courts of Equity May Enforce New Equitable Remedies for Equitable Rights.—The bounds of the equity jurisdiction of the United States Courts being

fixed by the Constitution, can neither be extended nor restricted by State legislation.¹ As has been stated, Federal Courts can, however, avail themselves of any new equitable remedy for the enforcement of a right which is equitable in its nature.

Jurisdiction over proceedings to quiet title and to prevent litigation is inherent in equity. The Courts have imposed limitations upon its exercise by declaring that to maintain a bill to quiet title it is necessary that the plaintiff be in possession and, in most cases, that his title shall have been established by law or founded on undisputed or long-continued possession. It is competent for the legislative power to remove such limitation.

A statute of Nebraska provided that an action might be brought and prosecuted to final decree by any person claiming title to real estate, whether in actual possession or not, against any person who claimed an adverse estate or interest therein for the purpose of determining such estate and interest and quieting the title to such real estate. It was held, the lands being wild and unoccupied and neither party in possession, that a bill to quiet title could be sustained in the Circuit Court for the District of Nebraska.² When, however, the defendant is in possession and the plaintiff claims a good legal title, the latter has a plain, adequate and complete remedy at law and no State statute will entitle him to proceed on the equity side of the Federal Courts.³

419. Federal Equity Procedure Uniform Throughout the Country.—While under the Conformity statute the pleading and practice of the Federal Courts on their law side are necessarily as varied as that of the States, precisely the opposite is true as to the conduct of their chancery business. Federal equity procedure and practice are uniform throughout the country.

420. Equity Rules of Supreme Court Regulate Federal Equity Procedure.—Under the provisions of sec-

¹ *Mississippi Mills vs. Cohn*, 150 U. S. 202.

² *Holland vs. Challen*, 110 U. S. 15.

³ *Whitehead vs. Shattuck*, 138 U. S. 146.

tions 913 and 917 of the Revised Statutes, the procedure in equity in the Federal Courts is, in larger part, regulated by the equity rules prescribed from time to time by the Supreme Court. Such rules were adopted in 1842. They remained in force for seventy years. During that time amendments and additions were made to them, but their general scheme remained substantially unaltered. On February 1, 1913, an entirely new set went into force. They made radical changes in equity pleading and practice.

421. The New Equity Rules.—They are published in full in Volume 198 of the Federal Reporter. They are intended to promote the prompt decision of causes and to insure, so far as possible, that they shall be decided in accordance with the substantial rights of the parties and not upon mere technicalities.

422. Technical Forms of Equity Pleading Abolished.—To this end the 18th rule declares “unless otherwise prescribed by statute or these rules, the technical forms of pleading in equity are abolished.”

423. The Bill.—A bill in equity should set forth the full name of every party when known, his citizenship and residence. If any party be under disability, that fact should be stated. The bill should contain a short and plain statement of the grounds upon which the jurisdiction of the Court depends, and of the ultimate facts upon which the plaintiff seeks relief. It is expressly directed that any mere statements of evidence shall be omitted. If from the bill it appears that there are proper parties to the litigation not made parties to the cause, the bill should explain why; as, for example, that they are without the jurisdiction of the Court or that they cannot be made parties without ousting its jurisdiction. If any special relief pending the suit or on final hearing is wanted, the bill must state it and ask for it. Relief may be sought in the alternative. Whenever special relief pending the suit is desired, as, for example, a preliminary injunction, the bill should be verified by oath of the plaintiff or by someone having knowledge of the

facts upon which such relief is asked.¹ One of the objects of the Supreme Court was to get rid of unnecessary prolixity in equity pleading. It is the duty of the Courts to give effect to this purpose by requiring counsel to omit unnecessary allegations and to cut out all useless verbiage no matter how greatly it may have the sanction of centuries behind it.

424. Joinder of Separate Causes of Action.—If there is only a single plaintiff and a single defendant, the plaintiff may unite all his causes of action cognizable in equity in one bill. Where there is more than one plaintiff the causes of action joined must be joint. If there is more than one defendant the liability must be one asserted against all the material defendants or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. To further convenience, justice and dispatch, the Court is empowered to order separate trials of the various causes of action alleged if, in its judgment, all of them cannot conveniently be disposed of together.¹

425. Process.—By the 12th Rule the clerk is required, upon the filing of a bill of complaint, to issue a subpoena for the defendant. It is returnable within twenty days from its issue.

426. Time in Which to Answer.—The defendant must file his answer or defense on or before the twentieth day after the subpoena is served on him,¹ unless for cause the judge extends the time for so doing. In counting these days, the day of service is excluded.² If he fails to answer in time the bill may be taken as confessed. These provisions greatly change the former practice. Under the old rules, all process was returnable to a particular return day; now it is returnable within twenty days of its issue. What is more important, the defendant no longer has so many days in which to enter his appearance and then so many

¹ Rule 25.

¹ Rule 26.

¹ Rule 16.

² Rule 12.

additional days to answer. He is required to file his answer within twenty days after the subpoena has been served upon him.

427. Pleas and Demurrers in Equity Are Abolished.

—Pleas and demurrers in equity are abolished. If upon reading a bill filed against your client you are of opinion that upon the face of it you have a defense in point of law, whether it be for misjoinder of parties, non-joinder of an indispensable party, or insufficient allegations of fact to constitute a valid cause of action in equity, you may make a motion to dismiss the bill or you may set up your defense in your answer. Whether you do one or the other that portion of your defense may, at the discretion of the Court, be called up and dispose of before final hearing. Every defense formerly presentable by plea in bar or abatement should be made in the answer, and in the discretion of the Court may be separately heard and disposed of before the trial of the principal case.¹

428. Must Answer Within Five Days After Denial of Motion to Dismiss.—If, representing the defendant, you move to dismiss the bill or any part thereof, your motion may be set down for hearing by either party on five days' notice. If it is denied your answer must be filed within five days thereafter or a decree *pro confesso* will be entered.¹

429. The Answer.—The rules require the defendant, in his answer, to set forth, in short and simple terms, his defense to each claim asserted by the bill. He is to omit mere statements of evidence. He is to avoid any general denial of the averments of the bill. He must specifically admit or deny or explain the facts upon which the plaintiff relies. If he is without knowledge of them, he must say so; and the effect will be the same as if he had denied them. Averments, other than of value or amount of damage, if not denied, shall be deemed confessed except as against an infant,

¹ Rule 29.

¹ Rule 29.

a lunatic or other person *non compos* and not under guardianship. When justice requires, an answer may be amended by leave of the Court or the judge, upon reasonable notice, so as to put any averment in issue. The answer may state as many defenses in the alternative, regardless of consistency, as the defendant deems essential to his defense.¹

430. Cross Bills Abolished, Counter-Claims in Answer Substituted.—Cross bills are abolished. There is no further necessity for them. The answer *must* state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and *may* set up any set-off or counter-claim against the plaintiff which might have been the subject of an independent suit in equity against him. Such set-off or counter-claim, so set up, has the same effect as a cross suit, and enables the Court to pronounce a final judgment, both on the original and cross claims.¹

431. What Affirmative Claims May Defendant in His Answer Make Against Plaintiff?—The lower Federal Courts seem to be having some difficulty in determining just what the Supreme Court meant by saying that the defendant might set out in his answer any set-off or counter-claim which might be the subject of an independent suit in equity against the plaintiff. The language is admittedly broad, but with the inherent conservatism of the Courts, some judges have held that the defendant may not set up any claim which he could not, under the old system of pleading, have made the subject of a cross bill.¹ It is easy to conceive of two controversies which, although between the same parties, are so unconnected that they cannot with any advantage be tried together. Perhaps it is because they have had such instances in mind that some of the Courts have been so unwilling to give to the words of the rule their most

¹ Rule 30.

¹ Rule 30.

¹ Williams Patent Crusher & Pulverizer Co. vs. Kinsey Mfg. Co., 205 Fed. 375; Terry Steam Turbine Co. vs. B. F. Sturtevant Co., 204 Fed. 103.

natural interpretation. Even if the broadest construction be accepted, it is not necessary that two unrelated cases shall be tried together. Rule 26 expressly provides that where the plaintiff joins two or more causes of action in his bill, the Court may order separate trials when they cannot be conveniently disposed of together. Doubtless the same discretion may be exercised when the difficulty of trying all the issues at one time is caused by the defendant uniting in his answer two or more counter-claims. It will be quite possible to deal in one action, although if need be by separate trials, with all the equitable controversies between the same parties, provided they are all within the jurisdiction of the Federal Courts. In that way a final decree when drawn will dispose of all the controversies between the parties at one time and neither will be able to secure a decree against the other, while the other's equity suit is still pending against him. The whole subject, and all the authorities, have been ably reviewed by JUDGE RELLSTAB.¹

432. General Replication Abolished.—Where the answer does not rely upon a set-off or counter-claim the case is regarded as at issue upon the filing of the answer. No general replication is required. If the answer sets up a set-off or counter-claim, the plaintiff must reply thereto within ten days after the filing of the answer unless the judge allows a longer time. In default of a reply a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.¹

433. Exceptions to Answer Abolished.—Exceptions to an answer are abolished, but if the answer set up an affirmative defense, set-off or counter-claim, the plaintiff, upon five days' notice, or such further time as the Court may allow, may test the sufficiency of the same by motion to strike out.¹

¹ Electric Boat Co. vs. Lake Torpedo Boat Co., 215 Fed. 377.

¹ Rule 31.

¹ Rule 33.

434. Equity Suit May Be Turned Into a Suit at Law.—A very important innovation is made by Rules 22 and 23. The former provides that “if at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.”

435. No Longer Necessary to Send Legal Issue to Law Court for Trial.—Rule 23 directs that “if in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.” I do not understand that it is intended by these rules to break down the doctrine that in the Federal Courts, law and equity are to be kept separate and to be administered by distinct tribunals. All that is now purposed, I suppose, is that this doctrine while preserved in substance, shall not be enforced in such a way as to cause any unnecessary hardship to the parties. It is not improbable, however, that before long some way will be found by which legal and equitable causes of action or of defense may be disposed of in one suit, the right of trial by jury secured by the seventh amendment being, of course, preserved.

436. Amendments.—Amendments may be allowed, at the discretion of the court, in furtherance of justice, at any stage of the proceedings, and the court may disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.¹

Whenever an amendment is made to a bill after answer filed, the defendant must put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court.²

437. Testimony to Be Taken in Open Court.—A great revolution in the practice of the Federal Courts will be worked by the new rule which requires the testimony in

¹ Rule 19.

² Rule 32

equity causes to be taken orally in open Court. Where witnesses reside more than a hundred miles from the place of holding the Court, or where for other reasons prescribed by statute it is permissible to take their depositions out of Court, such depositions may still be taken and used, as they may be when in the case of particular witnesses good and exceptional cause for departing from the general rule is shown by affidavits.¹

438. Time Within Which Depositions Must Be Filed.—It is provided that all depositions taken under a statute or under any order of Court shall be taken and filed, unless otherwise ordered by the Court or judge for good cause shown, within the following times, viz, “those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff’s depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.”¹

439. Expert Testimony in Patent and Trade-Mark Cases.—In a case involving the validity or scope of a patent or trade-mark, the District Court may, upon petition, order that the testimony in chief of expert witnesses whose testimony is directed to matters of opinion, shall be set forth in affidavits and filed as follows—those of the plaintiff within forty days after the cause is at issue, those of the defendant within twenty days after the plaintiff’s time has expired, and those in rebuttal within fifteen days after the expiration of the time for filing original affidavits. These are obviously to be *ex parte* affidavits, because the rule provides that, should the party desire the production of any affiant for cross-examination, the Court will, on motion, direct that the cross-examination and re-examination shall take place before the Court upon the trial, and unless the affiant is produced and

¹ Rules 46, 47.

¹ Rule 47.

submits to cross-examination in compliance with such direction his affidavit shall not be used as evidence in the cause.¹

440. When Case Goes on Trial Calendar.—As soon as the time for taking and filing depositions under these rules has expired, the case is placed on the trial calendar. Thereafter no further testimony by deposition may be taken except for some strong reason shown by affidavit. In every application for permission to do so, the reason why the testimony of the witness cannot be had orally at the trial and why his deposition has not been before taken shall be set forth, together with the testimony which it is expected he will give.¹

441. Postponements and Continuances.—After a cause has been placed on the trial calendar it may be passed over to another day of the same term by consent of counsel or order of Court. It shall not be continued beyond the term save in exceptional cases by order of the Court upon good cause shown by affidavit and upon such terms as the Court shall at its discretion impose. Continuances beyond the term by the consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties, and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar subject to re-instatement within one year upon application to the Court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year the suit shall be dismissed without prejudice to a new one.¹

442. Reference to Special Masters Discouraged.—Heretofore special masters have been much used in the Federal Courts—less in this district, I think, than in most others. Such references had become in many places so

¹ Rule 48.

¹ Rule 56.

¹ Rule 57.

habitual as to result in much increased cost and in great waste of time. Rule 59, therefore, declares that, save in matters of account, a reference to a master shall be the exception and not the rule. Such reference will be made only upon a showing that some exceptional condition requires it.

443. Beginning Proceedings Before Special Master.

—The party on whose motion the order of reference is made must cause it to be presented to the master for a hearing within twenty days succeeding the time when it was made, unless a longer time is specially granted by the Court or judge. If he omits to do so the other party is at liberty forthwith to cause proceedings to be had before the master at the cost of the party procuring the reference.¹

444. Proceedings Before Special Master.—Under an order of reference a special master can compel the attendance of witnesses before him. He can go thoroughly into the facts and the law and is expected so to do. When he prepares his report, the approved practice is for him to submit it, or copies of it, to the various counsel in the case and give them time to examine it and make objections to him. He considers these objections. He either does or does not change his report to meet them. He then returns it to the Court with his findings of fact and conclusions of law. He usually files with it a transcript of all the testimony taken before him and the originals of all exhibits filed with him. The report, after it is submitted, lies in the clerk's office for twenty days. If no exceptions are taken within that time it stands confirmed. If any are filed they stand for a hearing before the Court, if then in session, or if not, at the next sitting held thereafter by adjournment or otherwise.*

445. Frivolous Exceptions to Master's Report Penalized.—In order to prevent exceptions to reports being filed for frivolous causes, or for mere delay, the exceptant for

¹ Rule 59.

* Rule 60.

every exception overruled pays \$5 costs to the other party, and for every one sustained is entitled to a like sum.¹

446. Weight to Be Given to Master's Report.—The weight to be given to a special master's report depends to a large extent upon the circumstances under which the reference is made and upon its terms. He is usually appointed to assist in the various proceedings incidental to the progress of the cause—as to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damage in particular cases, the auditing and ascertaining of liens on property involved, and similar services.¹

His report is merely advisory to the Court. The latter may accept and act upon it or disregard it in whole or in part, according to its own judgment as to the weight of the evidence. Even in references of this character the Court confirms the report as matter of course if exceptions are not taken to it. Unless the master's findings are found unsupported or defective in some essential particular, there is a presumption in their favor. It is this kind of reference, and this only, that can be made by the Court upon its own motion or upon the application of one of the parties without the consent of the other. Sometimes, however, both parties consent to a reference to a master to hear and decide all issues in the case and to report his findings both of the facts and the law. The determinations of the master so selected are not subject to be set aside and disregarded at the mere discretion of the Court. Such a reference is a submission of the controversy to a judge of the parties own selection, to be governed in his conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. His findings are to be taken as presumptively correct, subject indeed to be reviewed under the reservation contained in the consent and order of the Court, when there has been manifest error in the consideration given to the evidence or in the application of the

¹ Rule 67.

¹ *Kimberly vs. Arms*, 129 U. S. 523.

law, but not otherwise. Such findings should not be disturbed unless they are clearly in conflict with the weight of the evidence upon which they were made.²

447. Preliminary Injunctions.—In a Maryland State Court, if a plaintiff sets forth, in his bill, a good cause for an injunction, the Court must give him one and that, too, without hearing the other party, or at all events, without giving any weight to what the other party says. If such injunction is refused by the lower Court an appeal may be taken to the Court of Appeals.¹

In the Federal Courts of Equity the rule is different. Before issuing an injunction they make every effort, reasonably practicable under all the circumstances, to hear the defendant's side. No preliminary injunction, technically so-called, ever issues from a Federal Court until after the party to be enjoined has been heard or has had an opportunity to be heard.²

448. Temporary Restraining Orders.—There are cases in which temporary restraining orders must be issued at once to prevent the situation being so radically changed before the parties can be heard as to make the hearing a rather academic performance. There have been some abuses, however, in the issuance of such restraining orders. While in form, temporary, they have frequently amounted, in fact, to preliminary, and sometimes almost to permanent injunctions. This happened when the time fixed for the hearing of the motion for the preliminary injunction was long postponed. In such a case the restraining order might remain in force as long as it was of any substantial use to the plaintiff or of any practical injury to the defendant.

Rule 73 was intended to prevent such abuse in the future. Its provisions have been incorporated in, and made somewhat more specific by, sections 17 and 18 of the Clayton Act,

² *Kimberly vs. Arms (supra)*.

¹ Article 5, sec. 31, Bagby's Code, 1912.

² Sec. 17, Clayton Act., Oct. 15, 1914.

which declares that "no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." The order must define the injury and state why it is irreparable and why it was granted without notice. By its terms it must expire within such time after entry, not to exceed ten days, as the Court or judge may fix, unless within the time so fixed it is extended for a like period for good cause shown. The reasons for such extension, if granted, must be entered of record. Whenever a temporary restraining order is granted without notice the matter of the issuance of a preliminary injunction must be set down for hearing at the earliest possible time. It takes precedence over all matters, except older matters of the same character. "When the same comes up for hearing the party obtaining the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the Court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the Court or judge shall proceed to hear and determine the motion as expeditiously as the needs of justice may require."

449. Hearings on Motions for Preliminary Injunction.—As a rule a motion for a preliminary injunction is heard upon affidavits. In the order of the Court setting down for hearing a motion for such an injunction, it is usually provided that the plaintiff shall have so many days to file affidavits in support of his motion, and that the defendant shall have so many days thereafter to file affidavits in reply. Proper provision is also made for the filing of rebutting affidavits by the complainant.

Section 18 of the Clayton Act requires that before a restraining order or interlocutory injunction shall issue, the applicant must give security in such sum as the Court or judge may deem proper for the payment of such costs or

damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained.

450. Clerk May Make Orders in Course.—A Federal judge may not be as accessible as a State judge usually is. He may be required, in the discharge of his duties, to be at some point quite remote from his clerk's office. The equity rules therefore authorize the clerk to issue a greater number of orders in course than is the practice in State Courts.¹

451. Sales Under Equity Decrees by the Federal Courts.—The discretion of a Federal Court of Equity in the selling of real estate is more limited than is that of a State Court in Maryland. The latter may under proper circumstances and with due care to prevent abuse, direct real property to be sold at private sale. Congress has withheld such power from the Federal Courts.¹

Whenever real estate or an interest in land is sold under an order or decree of any United States Court, the sale must be public. It has been held by the Circuit Court of Appeals for the Fourth Circuit that this provision of law is mandatory. Even after confirmation, a private sale may be set aside at the instance of the purchaser.

Moreover, the statute restricts the place at which sales may be made to the Court House of the county, parish or city in which the land is situated or to the premises. On the other hand, the Court is given power to direct in what other manner sales of personal property may be made. If no special direction is given the statutory provisions must be followed.

Before real estate can be validly sold under a judicial decree, notice of the sale must be given once a week for at least four weeks prior to the date fixed for it, in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be.

¹ Rule 5.

² Act March 3, 1893, 27 Stat. 751.

² *Cumberland Lumber Co. vs. Tunis Lumber Co.*, 171 Fed. 352.

CHAPTER XVI.

THE SUBSTANTIVE LAW APPLIED BY THE
FEDERAL COURTS.**452. The Substantive Law Applied by the Federal Courts to Cases Within Their Exclusive Jurisdiction.—**

So far as concerns those subjects the control of which is by the Constitution given to the Federal Government, the substantive law applied is found in the statutes of Congress, in the decisions of the Federal Courts, in the general principles of admiralty and international law, and in what is, in the view of the Federal Courts, the common law.

453. Substantive Law Applied by the Federal Courts to Cases in Which Their Jurisdiction is Concurrent With Courts of the States.—

There are many cases which can be brought in either a State or a Federal Court. Some of these, if instituted originally in the State Court, may be removed to the Federal; as, for example, those in which Federal questions are involved or in which there is the necessary diversity of citizenship between the parties.

454. Federal Courts Apply State Law.—Generally speaking the substantive law applied to such controversies is the same as governs the State Courts of the State in which the Federal Court is sitting. Quite clearly it ought to be so. Most of the transactions which get into Court are entered into subject to the law of some State. Except in very peculiar cases there is no reason why that law should not be applied to the settlement of the controversy, whether the case, if in Baltimore, be tried in the State Court on the west side of Monument Square or in the Federal on the east side.

455. State Statutes Rules of Decision in Common Law Trials in Federal Courts.—Section 34 of the original Judiciary Act provided that “the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.” This provision now constitutes section 721 of the Revised Statutes.

456. Federal Courts Are Bound by the Construction Given by the Highest Court of the State to Its Constitution and Statutes.—A part of the law of every State is its Constitution and its statutes. There may often be room for difference of opinion as to what particular provisions of either may mean. The interpretation put upon them by the highest Court of the State will be accepted by the Federal Courts as governing all transactions which originated after the announcement of the State Court decision. They will not inquire whether it commends itself to their judgment or not. The reasons for this rule were explained many years ago by CHIEF JUSTICE MARSHALL. He said:

“This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation, as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and

laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States.”¹

457. Applicable State Statutes Will Be Enforced By Federal Courts Sitting in Equity Where the Demarcation Between Law and Equity is Not Affected.--

The statute has reference to cases at common law only. It does not apply to chancery suits for reasons which have already been fully explained. Nevertheless, Federal Courts sitting as Courts of equity, do administer the statutory law of the State. Its applicable statutes are enforced by a Federal chancellor precisely as they would be in a common law case except where they in some wise affect the line of demarcation between law and equity. A State statute in force at the time of the delivery of a mortgage gave the mortgagor twelve months to redeem after foreclosure sale. It was held that such right could be exercised when the mortgage was foreclosed in a Federal Court.¹

458. Section 721 Has Application to Substantive Law and Not to Procedure.—Back in the early twenties there were hard times in Kentucky. Creditors were insistent and were, moreover, not willing to take the notes of State banks in payment. The Legislature provided that if, upon execution, plaintiff would not accept them, the defendant, upon giving a bond, might replevy the property seized and thereby stay further proceedings for two years. It was contended that this statute was applicable to judgments rendered by the Federal Courts in Kentucky. The Supreme Court held that it was not, and pointed out that section 34 of the Judiciary Act, now section 721 of the Revised Statutes, relates solely to rules of decision and has nothing to do with process.¹

¹ *Elmendorf vs. Taylor*, 10 Wheat. 152.

¹ *Brine vs. Insurance Co.*, 96 U. S. 627.

¹ *Wayman vs. Southard*, 10 Wheat. 1.

The real purpose of the 34th section was to recognize a principle of universal law, viz, that in every forum a contract is governed by the law with a view to which it was made.

459. When it is Claimed That the State Has Impaired the Obligation of a Contract the Decisions of the State Courts as to the Construction of a Statutory or Constitutional Provision Are Not Always Binding on Federal Courts.—Sometimes after a statute or a constitutional provision of a State has received a settled construction from its highest Court, and contracts have been made in reliance thereon, the policy of the State and the decisions of its Courts change. Under such circumstances the Supreme Court has sometimes held that the later construction by the State Court was itself a part of the State action and impaired the obligation of the contracts. Thus, for example—the Supreme Court of Iowa had in a number of decisions delivered between 1853 and 1859 upheld the right of municipalities of that State to issue bonds in aid of railroad enterprises. In 1857 the City of Dubuque issued such bonds which were taken in good faith by the public. In 1859 the Supreme Court of Iowa held that it had been wrong in its previous decision and that under the Constitution of the State a municipality had no right to issue bonds for any such purpose. The Supreme Court of the United States held that such change of decision could not impair the obligation of the contract between the city and the bondholders.¹

460. State Court Construction of State Statutes Made After a Case Has Been Brought in the Federal Courts Not Binding Upon It.—A creditor of a corporation brought suit in a State Court against a non-resident defendant to enforce a liability said to be imposed by a State statute upon him as a stockholder. He removed the case to the Federal Court. Up to the time the suit was brought the State Courts had never construed the statute. While the

¹ *Gelpcke vs. City of Dubuque*, 1 Wall. 175.

case was pending, the highest Court of the State interpreted it. Under the meaning thereby given it the defendant would have been liable. This construction was held not to be binding upon the Federal Courts, the Supreme Court saying:

“The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.” * * * “Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute

independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.”¹

461. “Laws” of the State Do Not Always Include its Unwritten Laws.—The word “laws” as used in section 721 does not necessarily include the decisions of the State Courts as to what their unwritten law is. Many years ago the Supreme Court said:

“They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws.”

The Court went on to say in all the various cases which had hitherto come before it for decision it had uniformly supposed that a true interpretation of the 34th section limited its application to State laws, strictly local;

“that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of com-

¹ Burgess vs. Seligman, 107 U. S. 33.

mercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.”¹

This was a case in which some persons in Maine had sold land, to which they claimed to have good title, to a citizen of New York. They drew upon him for part of the purchase money. He accepted the draft in New York. His acceptance was, therefore, a New York contract, and as the draft was to be paid in New York the contract was made to be performed in that State. After the draft had been accepted it was endorsed over by the drawers to another citizen of Maine on account of a pre-existing debt owed by them to him. He had no knowledge of the circumstances. At the trial in the United States Court it appeared that the representations made by the original vendors of the land and drawers of the draft were materially untrue and fraudulent. The holder of the draft, the plaintiff in the suit, answered that he was a *bona fide* holder for value. Under the law of New York, he was not such holder, because according to the then rulings of its Courts, one who took a negotiable instrument on account of a pre-existing debt was not a holder for value in such sense that he could maintain an action when the original payee could not. The Supreme Court held, however, that this was a question of general commercial law; that they were not bound by the decisions of the State Courts of New York, and that such holder was a holder for value.

¹ Swift vs. Tyson, 16 Peters, 1.

462. Reasons Why Supreme Court Will Not in Some Matters Follow State Decisions.—It is desirable that State and Federal Courts shall apply the same law to similar state of facts. It is also true that it is highly expedient that commercial transactions, frequently extending, as they do, across State lines, shall be governed by a law uniform throughout the nation. Only the Supreme Court of the United States is so situated that it may hope that its views will, in the long run, be accepted in all parts of the Union. It has therefore deemed it wise in such matters to follow its own opinion.

The law of negotiable instruments,¹ the construction of insurance contracts,² the liability of common carriers,³ the validity of the stipulations in their bills of lading,⁴ the measure of damages in suits against them,⁵ the law of master and servant,⁶ are among the questions of commercial law as to which the Federal Courts do not feel constrained to follow the State decisions. They, of course, are bound by any valid and applicable State statute.

The whole subject of when and how far the Federal Courts must follow the decisions of those of the States is reviewed in the case of *Kuhn vs. Fairmount Coal Co.*⁷

¹ *Railroad Co. vs. National Bank*, 102 U. S. 23.

² *Carpenter vs. Providence Washington Ins. Co.*, 16 Peters, 495.

³ *Chicago, Milwaukee & St. Paul Ry. Co. vs. Ross*, 112 U. S. 377.

⁴ *Railroad Co. vs. Lockwood*, 17 Wall. 357.

⁵ *Railway Co. vs. Prentice*, 147 U. S. 101.

⁶ *B. & O. R. R. Co. vs. Baugh*, 149 U. S. 368.

⁷ 215 U. S. 349.

CHAPTER XVII.

APPELLATE JURISDICTION OF THE COURTS OF
THE UNITED STATES—DIRECT APPEALS
FROM DISTRICT COURTS TO
SUPREME COURT.

463. Two Methods of Initiating Appellate Proceedings.—A review of the rulings and conclusions of the lower Court may be sought in one of two ways—either by writ of error or by appeal. The former is the appropriate method of bringing to the attention of the reviewing tribunal mistakes which the lower Court made in hearing and determining a case at law. The latter is the proceeding by which a reversal or modification of an erroneous determination of a suit in equity may be secured. The circumstances under which each of them can be properly employed will be considered later. While discussing the appellate jurisdiction of the Federal Courts, in order to avoid unnecessary repetition, the word appeal will be used whichever is meant.

464. Courts Over Which the Appellate Jurisdiction of the Federal Courts May Be Exercised.—The jurisdiction of the Circuit Court of Appeals is limited to appeals from the District Courts of their respective circuits, and to the enforcement or review of certain classes of orders of the Interstate Commerce Commission, the Federal Reserve Board and the Federal Trade Commission.¹ The Supreme Court may sometimes entertain direct appeals from the District Courts. In some classes of cases it has, and must exercise, appellate jurisdiction over the determinations of the Circuit Courts of Appeals, and it may, if it deems best, by writ of *certiorari*, review any of their decisions. It, moreover, may, under some circumstances, issue writs of error to the Courts of the States. The last is the most important, though by no means the most frequently exercised, jurisdiction of the highest Court of the Union.

465. Jurisdiction of the Circuit Court of Appeals.—Except as stated in the next preceding section, the Circuit Courts of Appeals exercise appellate jurisdiction only.

¹ Sec. 11, Clayton Act, Oct. 15, 1914.

The rule is that from the final decision of a District Court, an appeal may be taken to the Circuit Court of Appeals of the circuit.¹ To this rule there are certain exceptions, viz, those in which an appeal lies directly from the District Court to the Supreme Court. Such cases are enumerated in section 238 of the Judicial Code. In order accurately to understand the limits of the jurisdiction of the Circuit Court of Appeals, it is necessary to know when the Supreme Court may be asked to review directly a final decision of a District Court.

466. Jurisdiction of the Supreme Court Over Direct Appeals From the District Courts.—There are six classes of cases, or, more accurately, of questions which may be carried directly from the District to the Supreme Court. They are:—

1. Cases in which the jurisdiction of the District Court is in issue.

2. Prize causes.

3. Cases that involve the construction or application of the Constitution of the United States.

4. Cases in which the constitutionality of any law of the United States is drawn in question.

5. Cases in which the validity or construction of any treaty made under the authority of the United States is drawn in question.

6. Cases in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

These are all of great importance. The reasons why it is expedient that they be promptly passed upon by the Supreme Court are obvious.

Apparently it has not always been easy for the profession to be sure whether certain concrete cases are or are not within any of them. A good deal of confusion and not a little profitless litigation has been thereby occasioned. It will be worth

¹ Judicial Code, sec. 128.

while to examine each of the classes separately and in some little detail.

467. When the Jurisdiction of the District Court is in Issue.—The first class of cases which may be appealed directly from a District Court to the Supreme Court are those in which the jurisdiction of the former is in issue. There may be various reasons for questioning the jurisdiction of a District Court to entertain a proceeding instituted before it. The defendant may set up that no Court, whether of the State or the Nation, has any authority to pass upon such a controversy as the plaintiff raises, or he may say that the plaintiff has taken into a court of law a case cognizable only in equity or *vice versa*, or, while admitting that the dispute is one upon which it is fitting a Court should pass and that the plaintiff has as between the legal and equitable sides of the Court chosen rightly, he may contend that the case is not one over which the particular District Court of the United States has jurisdiction under the Constitution and the statutes.

468. The Issue Must Be as to the Jurisdiction of a District Court as a Court of the United States.—It is only when the jurisdiction of the District Court as a Court of the United States is challenged that an appeal can be taken directly to the Supreme Court. If the objection would be equally applicable to the jurisdiction of a State Court or of any Court of law or of any Court of Equity, as the case may be, then no issue is raised which can be carried directly to the Supreme Court.

In the first and leading case on the subject, a bill in equity was filed, by a citizen of Rhode Island against a citizen of Massachusetts, alleging failure to pay royalties under a patent license and praying for an injunction and an accounting. More than the necessary jurisdictional amount was in controversy. The defendant objected to the jurisdiction on the ground that there was a plain, adequate and complete remedy at law. The lower Court so held. The plaintiff took

an appeal to the Supreme Court. It was there dismissed. The Court quoted with approval what had been said in an earlier case by CHIEF JUSTICE FULLER while presiding over the Circuit Court of Appeals for the Seventh Circuit, to the effect that—

“We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the” appellees “had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the Circuit Court was therefore not in issue within the intent and meaning of the act.”¹

“When the requisite citizenship of the parties appears, and the subject-matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant’s prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals.”²

In another case, the lower Court dismissed the bill because in its view the controverted questions had become *res adjudicata* in consequence of certain prior decisions of a State Court. The Supreme Court said that the jurisdiction of the lower Court as a Court of the United States was not in issue and therefore that an appeal directly to it did not lie.³

In *Louisville Trust Co. vs. Knott*,⁴ the subject was rather fully reviewed. It was there held that the question as to whether a State or a Federal Court had first acquired jurisdiction of certain property did not raise any question of the jurisdiction of the Federal Court as such, but merely a question as to which of two Courts of concurrent jurisdiction

¹ *World’s Columbian Exposition Case*, 56 Fed. 656.

² *Smith vs. McKay*, 161 U. S. 355.

³ *Blythe vs. Hinckley*, 173 U. S. 501.

191 U. S. 225.

had first acquired it in the particular case. The appeal was therefore dismissed.

The same conclusion was reached when the question at issue was, whether, the necessary diversity of citizenship existing, a suit could be maintained in a Court of the United States under the Employer's Liability Act of Massachusetts. The defendant contended that the Court had no jurisdiction to enforce the penal law of another sovereignty. The Supreme Court said that was a question of general law and not one peculiar to the Court below as a Federal Court.⁵

On the other hand, it is clear that where the jurisdiction of the District Court is challenged upon the ground that there is not the necessary diversity of citizenship to give it jurisdiction as a Federal Court a direct appeal will lie. A guardian of an infant brought suit in the Federal Court. The facts were such that if the citizenship of the guardian determined whether the diversity existed or not, the Court had jurisdiction; while, if the citizenship of the ward was the controlling circumstance, it had not. It was held that an appeal to the Supreme Court was properly taken.⁶

Quite obviously such an appeal is authorized where the jurisdiction of the Court below turns on the residence of the defendant or on the existence of a Federal question.⁷

469. Whether Defendant is Liable to Suit in the Particular District Raises a Question of Jurisdiction Which Can Be Carried Directly to the Supreme Court.

A controversy as to whether the defendant is or is not liable to suit in the particular district in which the action has been brought, when arising in a case in which there is a sufficient amount in controversy, and either a Federal question is involved or diversity of citizenship exists, raises a question of jurisdiction directly appealable to the Supreme Court.¹

In one case the plaintiff and the defendant were citizens of different States. Suit had been brought in a State Court

⁵ *Fore River Shipbuilding Co. vs. Hagg*, 219 U. S. 175.

⁶ *Mexican Central Ry. Co. vs. Eckman*, 187 U. S. 429.

⁷ *Davidson Bros. Marble Co. vs. U. S.*, 213 U. S. 10; *Moyer vs. Peabody*, 212 U. S. 78.

¹ *Ladew vs. Tennessee Copper Co.*, 218 U. S. 357.

in a district of which neither was a resident. The defendant removed the case to the Federal Court. The question of jurisdiction turned on whether or not the plaintiff had waived its right to object that the defendant was not suable in that particular Court. A direct appeal was properly taken to the Supreme Court.²

470. Whether Defendant Has Been Properly Served With Process Raises a Question of Jurisdiction Appealable to the Supreme Court.—Whether the Federal Court acquired jurisdiction over a defendant by a proper service of process may be reviewed by direct appeal to the Supreme Court.¹

471. Direct Appeal to the Supreme Court as to Jurisdiction Carries Up That Question Only.—The statute provides that in any case in which the jurisdiction of the District Court is in issue, that question alone shall be certified to the Supreme Court. A defendant may believe that the lower Court was without jurisdiction, and may also be persuaded that it was wrong on other questions. If he carries the case directly to the Supreme Court he will be able to bring up the jurisdictional issue only, and if it should decide against him he would be unable to raise his other objections. On the other hand he may not wish to waive his protest against the assumption of jurisdiction. He therefore does not want to drop that contention and go to the Circuit Court of Appeals on the others alone. What he should do under such circumstances was elaborately discussed by the Supreme Court in *United States vs. Jahn*.¹ The following rules were there laid down:

1. If the jurisdiction of the Circuit (now District) Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question

² *Western Loan & Svgs. Co. vs. Butte & Boston Consolidated Mining Co.*, 210 U. S. 368.

¹ *Remington vs. Central Pacific R. R. Co.*, 198 U. S. 95.

¹ 155 U. S. 109.

certified and take his appeal or writ of error directly to this Court.

2. If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff who has maintained the jurisdiction must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it.

3. If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this Court, or to carry the whole case to the Circuit Court of Appeals and the question of jurisdiction can be certified by that Court.

4. If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this Court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined.

5. The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits.

472. Same Party Cannot Take Two Appeals—One on the Jurisdiction, the Other on the Merits.—From these rules it appears that there cannot be two appeals by the same party, one to the Supreme Court on the question of jurisdiction and one to the Circuit Court of Appeals on the merits.¹

Where the defeated party first appeals to the Circuit Court of Appeals on the merits and then to the Supreme Court on

¹ United States vs. Larkin, 208 U. S. 333.

the question of jurisdiction, the appeal to the Supreme Court will be dismissed.²

473. When Appeal is Taken to the Circuit Court of Appeals on the Jurisdiction and Other Questions, the Circuit Court of Appeals May, But Need Not, Certify the Question of Jurisdiction.—Where an appeal is taken to the Circuit Court of Appeals generally, the question of jurisdiction, as well as the merits, being involved, if the Circuit Court of Appeals does not see fit to certify the jurisdictional issue to the Supreme Court, no appeal from its decision on that or the other questions in the case will be entertained by the Supreme Court, although, of course, the latter may in its discretion allow a writ of *certiorari*.¹

474. Lower Court Must Certify to Question of Jurisdiction.—The statute provides that, in a case in which the jurisdiction of the lower Court is in issue, the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision. The Supreme Court has repeatedly ruled that it cannot entertain the appeal unless there is a certificate of the kind specified in the statute or some sufficient equivalent therefor.¹

It is not necessary that the certificate shall profess to be such. The Court is not required to use the word "certify"; nor is it essential that there shall be anything which on its face purports to be a certificate. It is sufficient if it appears from the lower Court's own statement in the record that its final decision turned on the question of jurisdiction. Thus, a final decree concluded "It is therefore ordered and decreed that said bill be and the same hereby is dismissed for want of jurisdiction." The order allowing the appeal contained the statement that it was allowed upon the final order and decree dismissing the suit for want of jurisdiction. The Supreme Court held that this itself constituted a sufficient certificate.²

² *Robinson vs. Caldwell*, 165 U. S. 359.

¹ *Weber Bros. vs. Grand Lodge*, 171 Fed. 839.

¹ *Maynard vs. Hecht*, 151 U. S. 324.

² *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co.*, 185 U. S. 282.

475. Such Certificate Must Be Granted Within the Term at Which the Final Decree was Made.—The Supreme Court has ruled that such a certificate must be given, if at all, during the term at which the final decision complained of was made.¹

476. When Decree Constitutes Sufficient Certificate, Appeal May Be Taken at Any Time Within Two Years.—Not only has the Supreme Court relaxed the rigor of the earlier decisions as to what is necessary to constitute a certificate, but it has gone far in limiting the practical effect of the rule that the certificate must be granted within the term. The final decree is, of course, made during the term in which the case is decided. When it is itself a sufficient certificate, the defeated party has the statutory period of two years in which to appeal.¹

477. Direct Appeal From Final Decree in Prize Cases.—Matters of prize almost necessarily have an international aspect. It is therefore expedient that there shall be an opportunity for a prompt and direct review by the Supreme Court of the final decree in all prize causes. We are so seldom at war with any Power which has any commerce that questions of prize seldom arise.

478. Direct Appeals in a Case Involving the Construction or Application of the Constitution of the United States.—In some senses the construction or application of the Constitution of the United States is involved in a very large proportion of the cases in the Federal Courts. If the language of section 238 were in this respect to be given the broadest construction, the large majority of cases decided by the District Courts would be directly appealable to the Supreme Court. In that event the Act of 1891 creating the Circuit Court of Appeals would largely fail of its purpose of lightening the burden of litigation pressing upon the Supreme Court.

¹ *Colvin vs. Jacksonville*, 158 U. S. 456.

¹ *Herndon-Carter Co. vs. Norris & Co.*, 224 U. S. 498.

479. In a Direct Appeal to the Supreme Court the Constitutional Question Must Be Controlling.—Very shortly after the passage of the act in question, the Supreme Court decided that in such cases a direct appeal to it will lie only when the construction or application of the Constitution was the controlling question.¹ As, for example, a citizen of the United States and of South Carolina brought suit against the election officers of his precinct for wrongfully refusing to receive his vote for a member of the National House of Representatives. Here the controlling question was whether the Constitution of the United States gave him the right so to vote, he possessing all the qualifications required of a voter for the members of the most numerous branch of the State Legislature. A direct appeal therefore lay to the Supreme Court.²

480. When Construction or Application of Constitution Controls, Supreme Court Passes On All Questions in the Case.—When the jurisdiction of the lower Court is involved and the appeal is taken directly to the Supreme Court, it is the jurisdictional question, and that alone, which is brought up. But in the other classes of cases in which by the provisions of section 238 a direct appeal may be taken the rule is otherwise. In them the Supreme Court passes upon all the questions which, under the established principles of law, are upon the record reviewable upon appeal or writ of error, as the case may be.¹

481. Where the Construction or Application of the Constitution is the Only Question in the Case No Appeal May Be Taken to the Circuit Court of Appeals.—A bank chartered by the State of Tennessee brought suit in the United States Court to enjoin the collection of a municipal tax, the imposition of which it alleged was a breach of a valid contract between it and the State. The bill

¹ *Carey vs. Houston & Texas Central Ry. Co.*, 150 U. S. 181.

² *Wiley vs. Sinkler*, 179 U. S. 58.

¹ *Horner vs. United States*, 143 U. S. 570.

was dismissed. The bank appealed to the Circuit Court of Appeals. Here the Court below was affirmed. This was not, as we shall later see, one of the cases in which the decision of the Circuit Court of Appeals was final. The bank thereupon prosecuted a further appeal to the Supreme Court, as it was entitled to do, if the Circuit Court of Appeals had ever regularly acquired jurisdiction of the case. The Supreme Court, however, held that the sole matter in issue being the constitutional question the appeal should have been taken directly to it from the Court of first instance, and that the Circuit Court of Appeals was without jurisdiction.¹

482. The Statute Does Not Permit Two Appeals From District Court.—In the case last cited, the familiar doctrine is reasserted, that the statute does not give to a party to a cause in the lower Court the right to two appeals, one to the Supreme Court on the constitutional question, and one to the Circuit Court of Appeals on the other issues involved. If the constitutional question is the controlling one in the case, the appeal must be taken directly to the Supreme Court. That Court has, as we have seen, the power to pass on all the other questions involved. If the constitutional question is only incidentally brought into the case, or is only one of two or more questions, anyone of which, if decided in favor of the appellant, would entitle him to judgment or decree, an appeal lies to the Circuit Court of Appeals. That Court may then pass on the constitutional as well as on the other questions involved, subject, if the case is not one in which the decision of the Circuit Court of Appeals is made final by statute, to a further appeal from it to the Supreme Court.

483. Constitutional Question is Not Involved Unless it is Clearly Raised Below.—The Supreme Court has said that in order to bring a case within this clause of the Act, the District Court must have construed the Constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply

¹ Union & Planters Bank vs. Memphis, 189 U. S. 71.

it. No construction or application of the Constitution can be said to have been involved in a judgment below, when neither was either expressed or asked for.¹

484. Cases in Which the Constitutionality of Any Law of the United States is Drawn in Question.—A mere controversy as to the construction of an Act of Congress cannot be taken to the Supreme Court upon a direct appeal¹

485. Cases in Which the Validity or Construction of Any Treaty of the United States is Drawn in Question.—It is necessary that the construction or validity of a treaty be involved in other than a merely incidental or remote manner if such circumstance is to justify taking the appeal directly to the Supreme Court.¹

*Pettit vs. Walshe*² is a good example of a case in which the construction of a treaty was drawn in question. There an alleged offender against the laws of Great Britain was resisting extradition. Both parties referred to the treaty between the two countries and based their contentions in part upon the interpretation they gave its provisions. The Supreme Court held that the construction of that treaty was involved, although it might also be necessary to construe the acts of Congress which provided the machinery for carrying out the obligations imposed by it.

486. A Case in Which the Constitution or Law of a State is Claimed to Be in Contravention of the Constitution of the United States.—The remaining class of cases under section 238 are those in which an attack was made below upon the constitutionality from a Federal standpoint of some provision of the Constitution or laws of a State. Either party, whose case in the Court below, as made by him, depended upon his being able to show that some State con-

¹ *Cornell vs. Green*, 163 U. S. 75.

¹ *Spreckels Refining Co. vs. McClain*, 192 U. S. 397.

¹ *Sloan vs. United States*, 193 U. S. 614.

² 194 U. S. 205.

stitutional or statutory provision was in conflict with the Federal Constitution, has the right to appeal from a decision against him directly to the Supreme Court. It was the purpose of Congress to give opportunity, to an unsuccessful litigant, to come to the highest tribunal of the Nation directly from the Federal Court of first instance in every case in which a claim is made that a State law is in contravention of the Constitution of the United States.¹

487. Direct Appeals by Government in Criminal Cases.—The Act of March 2, 1907,¹ creates another class of cases in which under some circumstances an appeal may be taken directly to the Supreme Court. Allusion has already been made to this statute in connection with the discussion of the criminal jurisdiction and procedure of the United States Courts. Appeals by defendants in criminal cases have long been common. They are taken to the Circuit Court of Appeals, and by statute its decision, in such cases, is final, subject, of course, to the right of the Supreme Court to issue a writ of *certiorari* if it sees fit.

The Act of 1907 for the first time gave an appeal to the Government. It is only from certain classes of rulings of the lower Court that such an appeal may be taken. They are: a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded; a decision arresting a judgment of conviction for insufficiency of the indictment where such decision is based upon the validity or construction of the statute upon which the indictment is founded; and a decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. It is provided that no writ of error shall be taken by or allowed to the United States in any case where there has been a verdict in favor of the defendant.

¹ Loeb vs. Columbia Township Trustees, 179 U. S. 472.

¹ 34 Stat. 1246.

The Act is constitutional The objection made to it was that it authorized the United States to bring the case directly to the Supreme Court, but did not allow the accused the same privilege. The Supreme Court said:—

“There is no merit in this suggestion. Except in cases affecting ambassadors and other public ministers and consuls and those in which a State shall be a party” * * * “we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make in the other cases to which by the Constitution the judicial power of the United States extends. What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution. If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed. Surely such an exception or regulation is in the discretion of Congress to prescribe, and does not violate any constitutional right of the accused.”²

488. A Direct Appeal Under the Act of 1907 is Limited to a Review of the Special Questions Enumerated in the Statute.—The Supreme Court has said that the Act plainly shows that jurisdiction is given only to review the special kinds of questions mentioned in it. The whole case may not be opened up above.¹ Thus, for instance, where a demurrer was sustained on two grounds, one involving

² United States vs. Bitty, 208 U. S. 393.

¹ United States vs. Keitel, 211 U. S. 398.

an appealable question, the other not, the Supreme Court considered only the first.² On such appeals the Supreme Court must accept the construction which the lower Court places upon the indictment.³

489. Direct Appeals Under the So-Called Expedition Act.—In order to facilitate the prompt and authoritative disposition of a class of cases of great public importance, Congress has provided that in any suit in equity, in which the United States is complainant, brought in any District Court under the Sherman Act or the Act to regulate interstate commerce, or any other Acts having a like purpose, the Attorney-General may file with the clerk of the Court a certificate that in his opinion the case is of general public importance. It is made the duty of the clerk thereupon to furnish a copy of that certificate to each of the circuit judges of the circuit. The case is to be given precedence over others and in every way expedited. It is to be assigned for hearing at the earliest day practicable, and before not less than three of the circuit judges of the circuit, if there be three or more, and if there be not more than two, then before them and such district judge as they may select. An appeal is given directly to the Supreme Court from any case under any of such Acts wherein the United States is complainant, whether the Attorney-General has made the certificate or not. Such appeal must be taken within sixty days from the entry of the decision.¹

It will be perceived that it is the District Court which is the Court of first instance. If there are any such cases in which the United States is a complainant and they are not expedited, the case is heard before the District Court as ordinarily constituted. When the Attorney-General makes the certificate provided for in the Act, the Court is as a rule composed altogether of circuit judges, that is, of judges who now do not usually sit at *nisi prius*. It is only when it is

² United States vs. Stevenson, 215 U. S. 190.

³ United States vs. Patten, 226 U. S. 535.

¹ Act of Feb. 11, 1903—32 Stat. 823.

not practicable to organize a Court of three without having a district judge among them that such a judge may sit. It is before Courts constituted as this Act requires that all the more important anti-trust litigation of the last ten years has been conducted. The provision that such cases shall be heard ahead of others is intended, of course, to get a speedy decision in matters of much public interest and importance.

490. The Expedition Act is Not Repealed by the Judicial Code.—The Expedition Act was not incorporated in the Judicial Code. The claim was therefore made that it had been repealed by that enactment. The Supreme Court has decided that this contention could not be sustained.¹

491. Appeals From Interlocutory Injunctions to Suspend State Statutes or Orders of Administrative Boards.—By the Act approved March 4, 1913,¹ section 266 of the Judicial Code is amended in such manner as to give a direct appeal to the Supreme Court from what is, at least nominally, a decision of a District Court in issuing an interlocutory injunction suspending the enforcement of a statute of a State, or of an order made by an administrative board or commission created by and acting thereunder. It is provided that no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in its enforcement or execution, or in the enforcement or execution of an order made by an administrative board or commission acting under such statute, shall be granted by a Federal judge upon the ground of the unconstitutionality of such statute, unless the application therefor shall have been heard by not less than three judges, of whom at least one must be a justice of the Supreme Court or a circuit judge. When application is made for such an injunction, the judge to whom it is made calls two other judges to his aid. At least five days' notice of the hearing must be given to the Governor and the

¹ *Ex parte* United States, 226 U. S. 420.

¹ 37 Stat. 1013.

Attorney-General of the State, as well as to such other persons as may be defendants in the suit. A temporary restraining order may be issued by the judge to whom the application is made.

The Court so constituted is really very much the same as the Circuit Court of Appeals, although nominally it is the District Court.

From any order either granting or denying the interlocutory injunction, an appeal may be taken directly to the Supreme Court.

To prevent unseemly conflicts between the States and the Federal Courts, the statute provides that if at any time before the hearing of an application for such an interlocutory injunction a suit be brought in a Court of the State having jurisdiction, accompanied by a stay, in such State Court, of proceedings under such statute or order, pending the determination of the suit by the State Court, all proceedings in the United States Court shall be stayed pending the final determination of the suit in the Courts of the State. In order to prevent an abuse of this provision, the statute declares that the stay may be vacated upon proof, made after hearing, and notice of ten days served upon the Attorney-General of the State, that the suit in the State Court is not being prosecuted with diligence and good faith.

CHAPTER XVIII.

APPEALS TO THE CIRCUIT COURT OF APPEALS.

492. Jurisdiction of the Circuit Court of Appeals.—

Circuit Courts of Appeals have jurisdiction to review final decisions of the District Courts in all cases except those in which appeals may be taken directly to the Supreme Court or in which some special statute otherwise provides.¹

493. The Appellate Jurisdiction of a Circuit Court of Appeals Does Not Usually Depend Upon the Amount in Controversy.—Ordinarily appeals may be taken from the District Court irrespective of the amount in controversy. To this general rule there are some exceptions imposed by the terms of particular Federal statutes. Thus, a decision of the District Court allowing or rejecting, upon the facts, a claim in bankruptcy, is appealable, if the claim amounts to as much as \$500, and not otherwise.¹ One who has sued the United States cannot appeal from a decision adverse to him unless his claim either exceeds \$3,000, or has been forfeited to the United States for fraud under section 172 of the Judicial Code.² To avoid misapprehension, it should be stated that the United States may appeal in any case in which there has been a judgment against it, no matter how small is the amount in controversy.

494. Appeals on the Facts May Be Taken From Decisions in Bankruptcy Proceedings in Three Classes of Cases Only.—The right to appeal generally, as in equity, from decisions of the District Courts so as to secure a review both of the facts and of the law, is limited in bankruptcy proceedings to three classes of questions—adjudications, discharges and claims of \$500 or upwards. No matter whether

¹ Judicial Code, sec. 128.

¹ Bankruptcy Act, sec. 25, par. A, clause 3.

² Reid vs. United States, 211 U. S. 529.

an adjudication be decreed or refused, a discharge granted or denied, or a claim for as much as \$500 allowed or rejected, the party aggrieved may appeal as of right, precisely as he can from a final decree in equity.¹

In matters of law, all proceedings of the District Courts in bankruptcy, whether interlocutory or final, other than the three just mentioned, may be superintended and revised by the Circuit Courts of Appeals.²

Both the provisions cited have reference to proceedings in bankruptcy proper as distinguished from controversies arising in bankruptcy proceedings. In the latter class of disputes there is the same right of appeal as in independent controversies originating otherwise than in bankruptcy. It is not expedient here to attempt to draw with precision the line which divides proceedings in bankruptcy from controversies arising in bankruptcy proceedings. "The former, broadly speaking, covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate." The latter, speaking with like breadth, involve "questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, concerning property in the possession of the trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments, but only the question of the extent of the estate."³

The whole subject is elaborately considered in the various standard text-books on bankruptcy.

495. In What Cases the Decisions of the Circuit Courts of Appeals Are Final.—The Circuit Courts of

¹ Bankruptcy Act, sec. 25a.

² Bankruptcy Act, sec. 24b.

³ *In re Friend*, 134 Fed. 778.

Appeals were created to lessen the burdens of the Supreme Court and to promote the prompt dispatch of business. Neither of these results would be attained if every party against whom they decided had a right to carry his case to the Supreme Court. The Judicial Code¹ therefore provides that their decisions shall be final in all admiralty cases, in those in which jurisdiction is dependent entirely upon diverse citizenship, and in all cases arising under the patent, copyright, revenue or criminal laws. For the most part the statutory provisions as to the finality of the decisions of these Courts speak for themselves. A little may be profitably said about them.

496. Do.—Under the Federal Trade-Mark Laws.—

By the Trade-Mark Act of 1905,¹ the Circuit Courts of Appeals are given appellate jurisdiction in cases arising under the trade-mark laws. It is provided that the decisions of those Courts in such cases may be reviewed by the Supreme Court upon *certiorari* in the same manner provided for patent causes. It has been held that by the use of such language, Congress intended that the decision of the Circuit Courts of Appeal in the absence of *certiorari* should be final in trade-mark precisely as in patent causes.²

497. Do.—In Cases in Which Federal Jurisdiction is Based Solely on Diverse Citizenship.—Whether jurisdiction depends solely upon diverse citizenship must be determined by an examination of the grounds upon which it was originally invoked. If from the plaintiff's statement of his own case, it does not appear that any ground of jurisdiction other than diverse citizenship exists, the decision of the Circuit Court of Appeals will be final, even though in the progress of the case other questions arose of which the Federal Courts would have had jurisdiction independently of the citizenship of the parties.¹ It is, not necessary, how-

¹ Sec. 128.

² Sections 17 and 18—33 Stat. 728, 729.

³ *Hutchinson, Pierce & Co. vs. Loewy*, 217 U. S. 457.

⁴ *Colorado Central Consolidated Mining Co. vs. Turck*, 150 U. S. 138.

ever, that the plaintiff shall in so many words base his claim that the Court had jurisdiction on anything other than diverse citizenship; if such other ground actually appears on the face of his pleadings. It makes no difference that he obviously did not appreciate its jurisdictional significance.²

When one of the parties is a corporation organized under the laws of the United States and is not a national bank, jurisdiction arises under the laws of the United States. The decision of the Circuit Court of Appeals is therefore reviewable on appeal by the Supreme Court.

As has been explained, for the purposes of the jurisdiction of the United States Courts, the Federal statutes assimilate national banks to State corporations. The Federal Court may have jurisdiction of a suit to which a national bank is a party. That jurisdiction may rest solely upon the fact that the national bank is located in one State and its adversary is a citizen of another State or is an alien. It is held that, in such a case, the jurisdiction of the District Court rests upon diverse citizenship. The decision of the Circuit Court of Appeals, upon appeal from a judgment or decree of the District Court, is therefore final.³

498. In Criminal Cases it is Only the Defendant Below Who May Invoke the Jurisdiction of a Circuit Court of Appeals.—As has been already stated, the United States may under some circumstances carry up a criminal case. When it does, its appeal must go directly to the Supreme Court; on the other hand, an appeal of the accused is taken to the Circuit Court of Appeals. The decision of the latter is final unless the Supreme Court sees fit to grant a writ of *certiorari*. This writ is granted sparingly, and the criminal cases in which it is allowed are very few.

499. Decisions of Circuit Courts of Appeal Are Final in All Cases in Which the Amount in Controversy Does Not Exceed \$1,000.—Section 241 of the Judi-

²Union Pacific Ry. Co. vs. Harris, 158 U. S. 326; *Ex parte Jones*, 164 U. S. 691.

³Continental National Bank vs. Buford, 191 U. S. 119.

cial Code gives a right of appeal from a judgment or decree of a Circuit Court of Appeals in every case in which the decision of the latter is not made final and in which the amount in controversy exceeds \$1,000 besides costs.

500. How the Amount in Controversy is Determined for Purposes of Appeal.—It will be noticed that in stating the sum necessary to give a right of appeal, interest is not expressly excluded, as it is by section 24 in fixing the amount required to be in controversy in order to give jurisdiction to the District Court. It follows that interest accrued before the judgment of the Court below and disposed of by its decree, if in dispute, between the parties, is a part of the sum in controversy; as, for example, when the principal sum of \$1,000 and seventeen years' interest thereon at six per cent was the matter in dispute, it was held that the amount in controversy exceeded \$2,000.¹

The rule was well stated in a subsequent Supreme Court case in which it was said that

“when the judgment is for the defendant or for the plaintiff, and for less than two thousand dollars, and the plaintiff sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if the judgment is for plaintiff and not more than two thousand dollars, and the defendant prosecutes in error, this court has not jurisdiction, for the amount in controversy, as to the defendant, is fixed by the judgment. In determining the jurisdictional sum or amount it is obvious that neither interest on the judgment nor costs of suit can enter into the computation, for costs form no part of the matter in dispute, and interest on the judgment can only arise after rendition, while the jurisdictional amount, if determined by the judgment, is fixed at rendition.”²

To give jurisdiction, the statutory amount must be really in controversy. At a time when the Supreme Court had

¹ United States Bank vs. Daniel, 12 Peters, 52.

² Walker vs. United States, 4 Wall. 163.

jurisdiction in certain classes of cases only when the amount exceeded \$5,000, there was a verdict for the plaintiff for \$5,000. There were motions for new trial and in arrest, both of which were overruled. All this took some time, so that judgment was not entered upon the verdict until a trifle over four months after the latter was rendered. When the judgment was entered, it was for the precise amount of the verdict. Some days later the Court on motion of the defendant's counsel, increased it to \$5,116.73, the \$116.73 being interest on the amount of the verdict from the time of its rendition to the entering up of the judgment. The Supreme Court said that that amount of interest was not in controversy, as the plaintiff had not claimed it.³ The motive of the defendant was to get an appeal to the Supreme Court.

501. Amount in Controversy Where Defendant Makes a Counter Claim.—In cases in which the defendant has put in a counter-claim, the amount in controversy upon an appeal may depend on which party is the appellant. When there has been a judgment for the plaintiff, and the defendant appeals, the amount in controversy is the judgment plus the counter-claim. If the defendant upon his counter-claim secures a judgment against the plaintiff, and the latter appeals, the amount in controversy is the sum of the claim and the judgment—as, for example, if the plaintiff claims \$900 and the defendant counter-claims for \$800, and there is a judgment for the plaintiff for \$900, the defendant might appeal, because the amount in controversy from his standpoint would be \$1,700. On the other hand, if the defendant recovered only \$50, the plaintiff could not appeal, because the amount in controversy would be only \$950.¹

502. Decisions of the Circuit Court of Appeals Upon Questions Arising in Bankruptcy Proceedings Are Usually Final.—The decisions of the Circuit Courts of Appeals

³ Northern Pacific R. R. Co. vs. Booth, 152 U. S. 671.

¹ Harten vs. Loffler, 212 U. S. 397.

upon questions arising in bankruptcy proceedings under sections 24b and 25a of the Bankruptcy Act, unlike their determinations of controversies arising in bankruptcy proceedings under section 24a of that statute, are, with the exceptions stated in section 494 *supra*, final, subject, of course, to the right of the Supreme Court to issue a writ of *certiorari* if it sees fit.

503. An Order of the Circuit Court of Appeals Allowing or Rejecting a Claim Exceeding \$2,000 May Under Some Circumstances Be Appealable.—The only exception to the rule stated in the preceding section is that an appeal may be taken from any final decision of a Circuit Court of Appeals allowing or rejecting a claim in bankruptcy where the amount in controversy exceeds the sum of \$2,000, and the question involved is either one which might have been taken by writ of error from the highest court of a State to the Supreme Court of the United States, or the determination of which, some justice of the Supreme Court shall certify, is in his opinion essential to a uniform construction of the Bankruptcy Act throughout the United States.¹

¹ Bankruptcy Act, section 25b.

CHAPTER XIX.

WRITS OF ERROR FROM SUPREME COURT TO
STATE COURTS.

504.—Section 25 of the Judicial Act of Sept. 24, 1789.—It is probable that section 25 of the Judiciary Act of September 24, 1789, has played a greater part in shaping the history of this country than any other enactment ever made by Congress. In a somewhat modified form, it now forms section 237 of the Judicial Code. That section provides, among other things, that “a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.”

If the Supreme Court had not been given such jurisdiction there would have been no way of insuring that the Constitution, laws and treaties of the United States should be the supreme law of the land in every part of the Union. There would have been very nearly as many constructions of some of their provisions as there are States. There would have been no way of reconciling these divergent views and no way

of asserting the national authority against those prevailing in any particular State. Every State would thus have been able to nullify any law of Congress, if it had so wished, and at one time or another nearly every State has been anxious to press its opposition to some congressional action to the extreme limit of its power. It is, therefore, highly probable that without the provision in question, or something very like it, either the Union would have been long since dissolved, or would today be very unlike the one under which we live. If it had not been embodied in the original Judiciary Act, there was probably no subsequent time, prior to 1861, at which it could have been enacted without raising a controversy, which would of itself have imperilled the continuance of the Federal Government.

In the view of a very large school of political thinkers, it extended the judicial power of the United States beyond the limits of the constitutional grant. For many years the Supreme Court of Errors and Appeals of Virginia denied its validity. A very dangerous situation would have resulted had not the original section, with great foresight, provided when the Supreme Court reversed a judgment or decree of a State Court it might, in its discretion, in any case which had once before been remanded by it, proceed to a final decision and award execution. State Courts would have refused to obey its mandate, as, in fact, the Supreme Court of Errors and Appeals of Virginia did. There would have been no way, that public opinion would have sustained, of coercing the State Court into obedience. When, however, the Supreme Court issued execution directly against the individual parties to the cause, they had either to submit or take the responsibility of making armed resistance to the officers of the United States. The requirement that before execution may issue directly from the Supreme Court there must have been one remand to the State Court, is no longer law. Section 237 of the Judicial Code now provides that the Supreme Court may, at its discretion, either remand the case or award execution.

The argument for and against the constitutionality of this section need not be here considered. That question has, long ago, been settled beyond the possibility of controversy or appeal. While it still was open, there was, from the standpoint of a jurist who did not think nationally and who looked more to the past than to the future, much to be urged against its validity. Few better examples of great legal ability devoted to the discussion of a question of transcendent importance are to be anywhere found than the opinion of CHIEF JUSTICE MARSHALL¹ in support of the constitutionality of the provision, and that of JUDGE ROANE² of the Virginia Court of Appeals on the other side.

505. Right to Review is Confined to Questions Which Affect the Boundary Between Federal and State Sovereignty.—As the wording of the section plainly shows, its sole purpose is to make the Supreme Court the final arbiter of litigated questions, the answer to which depends upon the correct determination of the respective spheres of the State and Federal sovereignties. It was not passed to give the Supreme Court power to correct all the mistakes which it might think State judges had made. If such errors, real or imaginary, do not affect the distribution of power between the State and Federal Governments, the latter has no concern with them.

506. When the Federal Question is Involved, the Right of Review is Not Limited to Any Particular Kind of Suit, Nor is the Amount in Controversy Material.—As we have seen, that jurisdiction of the lower Federal Courts which is concurrent with the Courts of the States is limited to civil suits, although a few criminal cases of a peculiar and limited character may be removed from the State to the Federal Courts. On the other hand, section 237 of the Judicial Code is equally applicable to criminal and

¹ *Cohens vs. Virginia*, 6 Wheat. 264.

² *Hunter vs. Martin*, 4 Munf. (18 Va.) 25.

civil suits.¹ If one of the questions enumerated in it has been raised and determined adversely to the Federal right relied upon, the Supreme Court may issue its writ of error. None of the reasons which have withheld from the Federal Courts jurisdiction over special classes of legal controversies, such as divorce suits, probate proceedings, etc., here apply. Anyone who in the State Courts claims a Federal privilege has, if it be denied him by the highest Court of the State to which he can carry that particular litigation, the right to invoke the judgment of the Supreme Court of the nation thereon. The Constitution, laws and treaties of the United States are thus made in fact, as well as in theory, the supreme law of the land.

The amount in controversy is not material. In the great case of *Cohens vs. Virginia* the plaintiffs in error were resisting the payment of a fine of \$100 and costs amounting in all to \$131.50.

507. The Various Classes of Cases in Which the Supreme Court May Issue Writs of Error to State Courts.—An analysis of what is now section 237 of the Judicial Code will show that there are three classes of cases in which the final decree of a State Court may be re-examined by the Supreme Court.

First, where the validity of a treaty or statute of, or an authority exercised under, the United States is drawn in question and the decision is against its validity.

Second, where the validity of a statute of, or an authority exercised under, any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States is drawn in question and the decision is in favor of its validity.

Third, where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States and the decision is against the title, right, privilege

¹ *Cohens vs. Virginia*, 6 Wheat. 264; *Twitchell vs. The Commonwealth*, 7 Wall. 321.

or immunity especially set up and claimed by either party under such Constitution, statute, commission or authority.

508. When is the Validity of a Treaty or Statute or an Authority Exercised Under the United States Drawn in Question?—The validity of a statute of the United States is not drawn in question merely because a dispute as to its construction is decided by the State Court. It is necessary that the treaty, statute or authority shall have been held invalid. Congress, by law, granted lands to the State of Alabama. Subsequently the State made conveyance of these lands and took a mortgage for part of the consideration. The State gave powers of sale to its grantee and mortgagor, to be exercised in accordance with the provisions of a section of the act of Congress under which the State itself had taken title. The mortgagor granted some of the lands. The State afterwards foreclosed its mortgage and acquired the mortgaged property. The question arose whether a purchaser from the mortgagor took good title as against the State. Whether he did or not, depended upon whether the grant made to him by the mortgagor was made in the way limited in the mortgage, which was, of course, that set forth in the section of the Act of Congress which the State had incorporated in its grant. It was held that no question involving the validity of an Act of Congress was in anywise involved.¹

509. When is the Validity of an Authority Exercised Under the United States Drawn in Question?—Doubtless the primary purpose of that provision of the section which authorizes the Supreme Court to issue a writ of error to the highest Court of the State whenever the latter denies the validity of an authority exercised under the United States, is to protect the proceedings of the Courts and officials of the United States from State obstruction or interference. For example—State Court plaintiffs set up a lien on certain personal property under a judgment rendered

¹ *Miller's Executors vs. Swann*, 150 U. S. 132.

by the Circuit Court of the United States for the Middle District of Tennessee. The defendant asserted a lien under a deed of trust from the judgment debtor. The Supreme Court of Tennessee held that the lien of the deed was paramount to that of the judgment. The validity of an authority exercised under the United States was therefore denied and the Supreme Court had jurisdiction.¹

An illustration of another class of cases in which is drawn in question an authority exercised under the United States, is found in *Railroads vs. Richmond*.² At a time when grain coming from the West to Dubuque was necessarily taken out of cars, placed on ferry boats, carried across the Mississippi and then again put into the cars, a railroad company made a contract, for a relatively long term of years, with the owners of an elevator, to elevate all such grain at so much per bushel. Subsequently, Congress made all railroads, post roads, authorized them to connect with other roads so as to form continuous lines of transportation and provided for the construction of a bridge across the Mississippi River at Dubuque. Upon completion of the bridge, the elevator service became unnecessary and the railroad discontinued its use. The owners of the elevator sued the railroad in the State Courts. The defendant contended that in not delivering the grain to the elevator it was acting under the authority of this Act of Congress. The highest Court of Iowa overruled this contention and gave judgment for the plaintiff. It was held that the validity of an authority exercised under the United States had been denied by the State Court and that a writ of error should issue.

510. When is the Validity of a Statute of a State or of an Authority Exercised Under Any State, Drawn in Question on the Ground That it is Repugnant to the Constitution, Treaties or Laws of the United States?—It is obvious that a litigant may be as effectually deprived of a right to which he is entitled under the Federal Consti-

¹ *Clements vs. Berry*, 11 How. 407.

² 15 Wall. 3.

tution or laws by sustaining a State law in conflict with them, as by holding them invalid. The section therefore provides a way of securing the protection of the Supreme Court against such State legislation.

Plaintiffs brought suit in a State Court to enforce, against a vessel, a lien given by State statute. The defendants set up that the lien was a maritime one and enforceable only in the Courts of Admiralty of the United States. The State Court decided in favor of the plaintiff. The decision was reviewable on writ of error from the Supreme Court.¹

Before the passage of the fourteenth amendment, the most frequent occasion for the exercise of this jurisdiction was the claim that State statutes, the validity of which State Courts upheld, had impaired the obligation of contracts. The famous case of the Trustees of Dartmouth College vs. Woodward² came before the Supreme Court upon a writ of error to the Superior Court of New Hampshire. For the last forty years or more numberless cases have gone to the Supreme Court upon the claim that some State statute has deprived a defeated litigant in the State Courts of liberty or property without due process of law, or has denied to him the equal protection of the laws.

511. Cases Where a State Court Decision is Against a Title, Right, Privilege or Immunity Especially Set Up or Claimed Under the Constitution or a Treaty or Statute of the United States or a Commission or Authority Held or Exercised Thereunder.—The first two classes of cases for which the section provides, are those in which the plaintiff in error has suffered because a State Court has declared invalid a statute or a treaty of the United States, or an authority exercised thereunder, or has held valid some State statute or authority which is in conflict with the Constitution, treaties or laws of the United States. Writs of error in such cases lie only when the decision is in favor of the validity of a State right or against that of a

¹ Edwards vs. Elliott, 21 Wall. 532.

² 4 Wheat. 517.

Federal one. Mere questions of the construction of statutes, State or Federal, are not, as we have seen, included in these classes. Sometimes, however, whether a man shall or shall not have rights to which he is entitled under the Federal Constitution, treaties or laws, depends upon the construction which the State Courts put upon some one of them. It is to guard against such possibilities, that the statute provides a third class of cases in which a writ of error may issue from the Supreme Court to the highest Court of the State to which the case can be carried, and that is where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

512. In the Third Class of Cases Provided for by Section 237 a Writ of Error Will Not Lie Unless the Plaintiff in Error Has Specifically Set Up His Claim in the State Court, and it Has Been There Denied.—In cases in which the State Court has decided invalid a statute or treaty of the United States, or an authority exercised thereunder, or has held valid a State statute or authority, it is not necessary that the defeated party should have specifically set up a claim as to their validity or invalidity, as the case may be. In such cases it is sufficient if the Federal question appears in the record in the State Court and was decided, or the decision thereof was necessarily involved in the determination of the case.¹

Nevertheless, even in cases coming within the first and second classes, the right of review by the Supreme Court exists only when either the Federal question involved was brought in some proper manner to the attention of the

¹ *Columbia Water Power Co. vs. Columbia Elec. Street Ry. Light & Power Co.*, 172 U. S. 475.

Court and expressly passed upon, or the judgment rendered could not have been given without deciding it.²

Where, however, the case falls within the third class, the Supreme Court has no jurisdiction unless the claim of Federal right was especially set up in the State Court.

513. How Claim of Right Must Be Specifically Set Up.—In the Supreme Court the defendant in error frequently objects that his adversary did not, in the Court below, specifically set up the Federal claim. The authorities declare that the record itself must affirmatively show that such claim was so made. If the plaintiff in error, has in the regular pleadings in the case, set up his Federal right as a ground of action or defense, it is, of course, sufficient. The pleadings may be silent on the question, if the opinion of the Court below shows that it was raised and decided. Originally this would not have been enough. The opinion of the lower Court was technically not a part of the record,¹ and section 25 of the Judiciary Act expressly provided that the Supreme Court should consider no error except it appeared on the "face of the record." That phrase had a definite meaning at common law. It did not have the same significance where the procedure was under the civil law. Accordingly, at a comparatively early date the Supreme Court was constrained to hold that, under the Louisiana practice, the opinion of a Court of that State was part of the record.² The adoption of the Code practice in many States and other statutory changes in their methods of judicial procedure, increased the difficulty of determining with precision what was and what was not technically a part of the record. Section 25 was revised in 1867.³ The express requirement that the error complained of must appear on the face of the record was omitted. The Supreme Court thereupon embraced the opportunity to hold that in future it would, if necessary, examine

² *Harding vs. Illinois*, 196 U. S. 86.

¹ *Williams vs. Norris*, 12 Wheat. 117.

³ *Grand Gulf R. R. & Bank. Co. vs. Marshall*, 12 How. 167.

⁴ 14 Stat. 386.

the opinion of the State Court to see whether the claim of Federal right had been there set up.⁴

As is stated in the opinion in the case last cited, the Supreme Court had long been in the habit of looking to a certificate of the presiding judge of the State Court, to aid it in determining what had been actually passed upon by that Court. Where such certificate is given, it is presumed to have been granted by the order of the State Court and to form part of its record.⁵ The effect of such certificate is, however, quite limited. If it does not otherwise appear from the record that the Federal claim is necessarily drawn in question, the Supreme Court will not take jurisdiction.⁶ This result will follow, although the Supreme Court has been careful to say that such certificate is always regarded with respect.⁷ The claim of Federal right must be specifically set up or claimed at the proper time and in the proper way. What is the proper way and the proper time depends to a large extent upon the practice in the State Court or upon what the State Court in the particular case did.

After a State Court has announced its final decision the parties are not entitled as of right to a rehearing, and the denial of one does not necessarily involve any decision upon the claim of Federal right set up for the first time in the petition for rehearing,¹ but if the State Court does see fit actually to pass upon such question, the substantial requirement that there shall have been a determination below on the specific point is met.²

Sometimes a case is fought out in the State Courts without any Federal question being raised at all. After the final decision of the State tribunals has been rendered, it may occur to the defeated party that there was a Federal question involved. He tries to prolong the litigation. He applies to the Supreme Court for a writ of error. Among his assign-

⁴ *Murdock vs. City of Memphis*, 20 Wall. 590.

⁵ *Armstrong vs. Treasurer of Athens County*, 16 Peters, 285.

⁶ *Railroad Company vs. Rock*, 4 Wall. 180.

⁷ *Powell vs. Brunswick County*, 150 U. S. 439.

¹ *Pim vs. St. Louis*, 165 U. S. 273.

² *Mallett vs. North Carolina*, 181 U. S. 592.

ments of error he sets up the denial of the alleged Federal right. It is too late for him to do so. He must have claimed that right before the decision of which he complains.³

514. The Supreme Court Has Jurisdiction Only When the State Court Has Denied the Federal Right.—

The sole purpose of section 25 of the Judiciary Act as also of the various statutes which, from time to time, have replaced it, is to protect Federal jurisdiction from encroachment by the States. The defeated party below is entitled to a writ of error only when a Federal right relied on by him has been denied. Of late years a very respectable body of opinion has come to believe that this limitation should be stricken from the law. Sometimes a State Court decides that some State legislation is invalid as being contrary to the Constitution of the United States, as, for example, when the Court of Appeals of New York in the famous *Ives* case held that the Workmen's Compensation Act of that State was void because it deprived the employers of their property without due process of law, or without such process of law, took from them the liberty of contract.¹ There are many who think that the Supreme Court of the United States would have held otherwise, and that it is highly desirable that on all such questions it shall be possible to obtain the decision of the highest tribunal of the land. The law, however, still remains that a Supreme Court review can be invoked only when the State Court has refused to admit some Federal right which the plaintiff in error has set up.

515. Plaintiff in Error is Not Entitled to a Writ From Supreme Court Until He Has Carried the Case to the Highest Court of the State to Which He Can Take it.—In accordance with the salutary rule that Federal interference in State affairs shall be carried no further than the exigencies of the situation require, a litigant will not be allowed to take his case to the Supreme Court, until he has

³ *Appleby vs. City of Buffalo*, 221 U. S. 524.

² *Ives vs. S. Buffalo Ry. Co.*, 201 N. Y. 271.

exhausted all the means open to him, to secure what he believes to be his Federal rights in the Courts of the State itself. Every State judge is as much bound by his oath of office to regard the Constitution of the United States and the laws and treaties made under it as the supreme law of the land, as is any Federal judicial officer. So long as the highest tribunal in the State, to which the question under the State laws and practice may be carried, has not spoken, the presumption is that, when it does speak, it will be to vindicate the Federal right.

On the other hand, the right of review would be in large part ineffective, if it could be exercised only after a decision on the question by the highest Court existing in the State. In many States, the decision of Courts inferior to the highest is final in certain kinds of litigation or upon certain questions.

The writ of error in the great case of *Cohens vs. Virginia* was issued to the Quarterly Sessions Court for the Borough of Norfolk, a Court which was composed of the Mayor, Recorder and Aldermen of that borough. The defendants, plaintiffs in error above, were there charged with selling tickets of a lottery not authorized by the law of Virginia, which then prohibited any traffic in lottery tickets not of its own creation. The defendants pleaded that Congress had incorporated the City of Washington and empowered it, among other things, to authorize the drawing of lotteries for effecting any important improvements which its ordinary funds or revenues would not accomplish, and that the tickets they were charged with selling were issued by the corporation of the City of Washington in pursuance of the authority there given. The Court decided that the plea was bad. The defendants were convicted and fined. They prayed an appeal to the next superior Court of law of Norfolk County. The prayer was refused on the ground that the decision of the Quarterly Sessions Court was final in such cases.

516. Rule in Cases in Which a Higher State Court May or May Not Allow an Appeal From a Lower.—

Under the laws and practices of a number of the States, as, for example, in Virginia, a defeated litigant in a lower Court is not entitled, as of right, to a writ of error, from, or an appeal to, the highest Court of the State. If he wishes either, he must ask for it. It may be allowed or refused. Before he can carry the case to the Supreme Court of the United States, he must have sought its allowance.¹ If it has been denied him he can sue out the writ of error to the trial Court, for that, under the circumstances, will be the highest Court of the State from which he can obtain a decision.² It may be added that there are cases in which, although there has been a decision upon the question in the highest Court of the State, the writ of error may issue to the lower Court. Whether it should or should not depends upon whether or not under the State practice, the record of the case remains in the lower or in the higher Court. The writ should regularly issue to the Court in which the record is,³ although, of course, the petition for it and the record must show that the highest Court of the State has given its decision.

517. The Supreme Court Has Jurisdiction to Pass On the Federal Question Only.—

It was quite clear from section 25 of the Judicial Act as originally enacted, that the Supreme Court could pass only on the Federal question involved. After passage of the Act of 1867¹ it was strongly contended that this rule had been changed; it was said that, hereafter, whenever a Federal question was in controversy, the Supreme Court had jurisdiction, and, having taken jurisdiction, was bound to pass upon all the issues in the case. That is the rule where the original jurisdiction of a District Court is invoked on the ground that the case arises

¹ Fisher vs. Perkins, 122 U. S. 523.

² Western Union Tel. Co. vs. Crovo, 220 U. S. 364.

³ Norfolk Turnpike Co. vs. Virginia, 225 U. S. 264; Wedding vs. Meyler, 192 U. S. 573.

¹ 14 Stat. 386.

under the Constitution, laws or treaties of the United States. In a characteristically able opinion, MR. JUSTICE MILLER, speaking for the Supreme Court, held, however, that in this respect the Act of 1867 was as limited as that of 1789.² The Supreme Court will pass upon such errors of law only as the State Court is said to have committed with reference to the Federal question.

Even where the case below is in equity, the interposition of the Supreme Court is obtained by writ of error and not by appeal, and questions of law only are open for review.³

518. If any Other Issue Adjudged by the State Court is Sufficient to Sustain its Judgment, the Supreme Court will not Reverse, No Matter How the Federal Question was Decided.—The Federal question may not be the only one at issue. Usually it is not. The party who denies the Federal right asserted by his adversary may say that he is entitled to a judgment even if his view of the Federal question is not sound. In such case, if the State Court upholds his contention as to one of the non-Federal issues, and that issue is sufficiently broad to sustain a judgment in his favor, no matter how the Federal question may be determined, the Supreme Court will not disturb the judgment below, even though the State Court has passed upon the Federal question and has reached a conclusion concerning it with which the Supreme Court cannot agree.¹

519. State Court Clerk May Be Compelled to Transmit the Record.—Sometimes State Courts which deny the constitutionality or applicability of the section of the Judiciary Act now under consideration, have directed their clerks not to furnish a transcript of the record. In such a case the Supreme Court will either issue a mandamus to the clerk requiring him to transmit the record, or it will, when under the facts it feels that it may safely do so, act upon what it is

² Murdock vs. City of Memphis, 20 Wall. 590.

³ Murdock vs. City of Memphis (*supra*).

¹ Murdock vs. City of Memphis, 20 Wall. 590.

satisfied is a true copy of the record, though not formally certified by the clerk.

In the famous case of *Ableman vs. Booth*¹ the question in
¹ 21 How. 506.

controversy was the constitutionality of some of the provisions of the Fugitive Slave Act. The Supreme Court of Wisconsin held them unconstitutional. A writ of error was sued out to the Supreme Court of the United States. The Supreme Court of Wisconsin thereupon directed its clerk to make no return to the writ of error and to enter no order upon the journals or records of the Court concerning the same. These facts being made to appear to the Supreme Court of the United States, it laid a rule upon the clerk to make return to the writ of error on or before the first day of the next ensuing term of the Supreme Court. He was still disobedient. The Supreme Court then permitted the plaintiff in error to file a certified copy of the record of the Supreme Court of Wisconsin in lieu of the return the clerk should have made.

CHAPTER XX.

FROM WHAT CLASS OF DECISIONS APPEALS
MAY BE TAKEN AND HOW.

520. Only Final Decisions Are as a Rule Appealable.—In the Federal judicial system, as in that of many of the States, the rule has always been that appeals will not lie from any judgment or decree which is not final. From the practical standpoint there are imperative reasons for imposing such restrictions upon the right of appeal. To go to an appellate Court is usually costly. It always takes time, often much time. If every decision of the trial Court could be made the ground of an independent appeal the waste of time and money would be ruinous. It would be frequently useless as well. Many a bitterly contested ruling of the Court below, in the subsequent progress of the case, becomes immaterial. Common sense dictates that before a litigant can invoke the protection of an appellate tribunal he must be certain that the decree of which he complains will, if carried into effect, hurt him.

On the other hand, neither Congress nor the people have ever been willing that in matters of any importance the trial Court shall have the last word. As to our judicial system we have always been idealists. We will not surrender the belief that, it is possible to administer justice so that it shall be free from error, both in form and in substance. We know that our lower Courts make mistakes. We create others whose sole business is to correct them. It may be that many of our experiments in this direction have not worked as we hoped. It is possible that better results would have been attained had we in matters of detail trusted more to the discretion and common sense of the Courts of first instance. However that may be, all of us feel that before anything of real value, be it life, liberty or property, is taken from

one man by the decision of another, the legality and justice of the determination should be passed upon by someone else.

In the course of actual litigation, and long before the final decision of the case below, there may be orders made which, if enforced, will alter the status of things so that no subsequent reversal can undo all of the harm which has been done. If appeals may be taken from every order which any of the parties dislike, the case may last forever. If they may not be taken, until the Court below has finished everything it has to do in the case, many of its decrees will have been long executed, sometimes greatly to the prejudice of one or more of the parties. Where to draw the line between those decrees which are so far final in their effect that from them an appeal should lie and those which are so far interlocutory and tentative that they should be held not appealable, presents a problem which has difficulties both practical and theoretical.

521. What Are Final Decisions?—In a case at law there can seldom be much question as to whether the judgment is final or not, but in equity there may be and very often is. Though our equity practice is modeled on that of England, we early gave a different definition to the term "final decree" from that which was well established there. There every decree, whatever its nature, was considered interlocutory until it was signed and enrolled, and even then it remained interlocutory unless it completely determined every question which arose in the cause. If any matter was reserved for further consideration, the decree was not called final. Such a rigid definition was there possible because appeals could be taken from interlocutory decrees. As with us they can not be, it has been necessary to relax considerably the English conception of finality.

Our Courts have tried to make the test a practical one. They are inclined to hold a decree or order final and therefore, appealable, if it requires something to be done which takes aught of substantial value from one of the parties, and if that which is commanded, cannot be undone by any subsequent reversal. When no such result will follow the

enforcement of the order complained of, there is usually no sufficient reason why an appeal should lie. Such is the general principle. The actual cases are for the most part in harmony with it.

As always in such matters, there are, in its application, some anomalies; as, for example, it was early held that, a permanent injunction against an alleged infringer in a patent case was not appealable, if the decree left open for subsequent determination the question of damages or profits.¹ When the rule was first laid down, it was hedged about by limitations to prevent its working a hardship. It subsequently became crystallized. The limitations were dropped out of sight.² Speaking generally, however, whether a decree is final or not will be tested rather by what will be its actual working than by merely theoretical considerations. A decree for the sale of particular property is final, although it may leave undetermined many things—as, for example, the way in which the proceeds shall be distributed.³ It is final because one of the parties asserts that the property is his and does not want it sold. The decree will if carried into effect change the status in a way which it will be impossible to undo.⁴

For the same reason a decree directing the immediate payment of money to anyone and awarding execution therefor, is so far final that it is appealable.⁵

In one sense there is nothing final about an order of Court authorizing the issue of receivers' certificates, even if it secures them upon property in the custody of the Court. But because it in fact imposes a lien upon the property, which a reversal of the order after it has been executed by the issue of the receivers' certificates and their sale might not discharge, it is held to be so far final as to be appealable.⁶

¹ *Barnard vs. Gibson*, 7 How. 656.

² *Humiston vs. Stainthorp*, 2 Wall. 106.

³ *Ray vs. Law*, 3 Cranch, 179.

⁴ *Whiting vs. United States Bank*, 13 Peters, 14.

⁵ *Forgay vs. Conrad*, 6 How. 203.

⁶ *Farmers Loan & Trust Co.*, 129 U. S. 206.

On the other hand, where the Court simply decrees that "A" is liable to "B" for the damage which "B" has suffered from some particular cause, or says that "A" should pay to "B" the profits which "A" has made in some particular way, but leaves the ascertainment of the amount of such damages or profits to future inquiry, no harm has been done to "A." None will be done to him until he is required to pay some sum. For that reason a decree in an admiralty cause that one of the parties is liable to the other for some tort, as, for example, the consequences of a collision, is not final. How much he will be forced to pay has yet to be determined. The final decree from which the appeal may be taken is that which, when such amount has been ascertained, directs the appellant to pay it.⁷

Theoretically the issue of an injunction intended to preserve the *status quo* during the litigation, or the appointment of a receiver merely to take charge of the property and hold it while the proceedings are pending, are interlocutory proceedings, and the Courts have always so held.⁸ Practically, the damage which may be done by putting one of the parties under an injunction or by taking property out of his hands and putting it into those of a receiver are so great and may be so permanent that such orders stand in a class by themselves. The Courts have not felt free to hold that they were final. Congress has therefore interposed by legislation.

522. Appeals From Interlocutory Decrees Granting, Refusing or Dissolving Injunctions or Appointing Receivers.—The law which created the Circuit Courts of Appeals attempted to make adequate provision on the subject. What was then done constituted the seventh section of the Act.¹ It is a matter not easy to deal with satisfactorily. The original section has already been four times amended,² sometimes by restoring something which an earlier amendment had stricken out or by striking out something which an

⁷ The *Palmyra*, 10 Wheat. 502.

⁸ *Grant vs. Phoenix*, 106 U. S. 429.

¹ 26 Stat. 828.

² 28 Stat. 666; 31 Stat. 660; 34 Stat. 116; sec. 129, Judicial Code.

earlier amendment had added. It now provides that an appeal may be taken from an interlocutory order or decree granting, continuing, refusing or dissolving an injunction or appointing a receiver. This appeal must in all cases be taken to the Circuit Court of Appeals, even although the case is one, in which, from a final decree, an appeal will lie directly to the Supreme Court. The decision of the Circuit Court of Appeals on an appeal from such interlocutory order is final in all cases,³ and the Supreme Court will not issue a writ of *certiorari*.⁴ The proceedings in other respects of the Court below are not to be stayed by such an appeal unless the trial or the appellate court, or a judge of the latter, so orders.

The propriety of the particular order appealed from is the sole question to be determined by the Circuit Court of Appeals. Sometimes, however, it happens that upon the hearing it decides that an injunction should not issue or that a receiver should not be appointed because it believes that the plaintiff has no case and cannot in any event prevail. Under such circumstances not only may the order appealed from be reversed, but a decree may be entered directing the Court below to dismiss the bill.⁵

523. Time in Which Appeals Must Be Taken.—

In all cases there are statutory limits upon the time in which appeals may be taken. They have been fixed by different Acts, passed at different times and drawn by different men, who for the most part apparently cared nothing for uniformity. As a consequence, some appeals must be taken within ten days. In others, two years is allowed.

Two Years. When it is sought to review a decision of a State Court or to take a case directly from a District Court to the Supreme Court, and no special statute is applicable, two years is given after the entry of the judgment, decree or

³ Mitchell Store Bldg. Co. vs. Carroll, 232 U. S. 379.

⁴ United States vs. Beatty, 232 U. S. 463.

⁵ Smith vs. Vulcan Iron Works, 165 U. S. 518; U. S. Fidelity Co. vs. Bray, 225 U. S. 214.

order complained of. Moreover if the party entitled to appeal is an infant, insane person or in prison, he has two years after the termination of such disability.¹ The exception is applicable only when the disability exists at the time the judgment or decree is entered.²

One Year. One year is given in which to take appeals to the Supreme Court from such decisions of the Circuit Courts of Appeal as are not final.³ The Supreme Court has said that it would expect applications for the writ of *certiorari*, in cases in which no appeal lies, to be taken within the like time.⁴

Six Months. Unless otherwise provided, one aggrieved by a judgment of a District Court has six months in which to appeal to the Circuit Court of Appeals.⁵

Three Months. One who has brought suit against the United States under the Tucker Act and has lost, has but ninety days in which to appeal.⁶ Before the enactment of the Judicial Code, the United States had six months.⁷ Whether that period has been cut down by section 243 has not yet been judicially determined.

Sixty Days.—In cases arising under the Interstate Commerce and Anti-Trust Acts, in which the Attorney-General has filed the certificate of expedition provided for by the Act of April 11, 1903,⁸ an appeal must be taken within sixty days.

Thirty Days. When the United States seeks to appeal in a criminal case, it must do so within thirty days. Appeals in prize cases must be taken within the same time. Appeals from the Circuit Court of Appeals to the Supreme Court under section 25b of the Bankrupt Act cannot be taken after the expiration of thirty days. The same time limit is

¹ Revised Statutes, secs. 1008 and 1003.

² McDonald vs. Hovey, 110 U. S. 619.

³ 26 Stat. 828, sec. 6; U. S. F. & G. Co. vs. Bray, 225 U. S. 205.

⁴ The Conqueror, 166 U. S. 110.

⁵ 26 Stat. 829.

⁶ Judicial Code, sec. 243.

⁷ United States vs. Davis, 131 U. S. 36.

⁸ 32 Stat. 823.

imposed upon appeals from interlocutory orders granting, refusing or dissolving injunctions or appointing receivers.

Ten Days. An appeal from a District Court to a Circuit Court of Appeals under section 25a of the Bankrupt Law must be taken within ten days.

The case of *Grant Shoe Co. vs. Laird*⁹ shows what curious results may follow from the way in which the statutes regulating appeals have been drawn.

An alleged bankrupt against whom an involuntary petition has been filed, may have a jury trial to determine whether he is insolvent or whether he has committed the act of bankruptcy charged against him. If he wishes it, he must ask for it, otherwise the case is tried by the Court. In the latter event an appeal from the order adjudicating or refusing to adjudicate may be taken to the Circuit Court of Appeals under section 25a, but if so it must be taken in ten days. In the *Grant Shoe Company* case a jury trial had been prayed. After the jury had been impaneled the bankrupt admitted its insolvency and the act of bankruptcy charged. There was nothing left for the jury to pass upon. The only disputed question was as to whether a petitioning creditor had a provable debt. That issue was one which the bankrupt had no right to have submitted to the jury. In any event, there was in the case in question no dispute about the facts. The only contention was that the claim was not provable because it had not been liquidated. The Court necessarily passed upon that precisely as it would have done had there been no jury, yet because a jury had been impaneled the provisions of section 25a of the Bankruptcy Act had no application. Review could be had by writ of error only. As the question raised went to the jurisdiction of the District Court, the case could be taken directly to the Supreme Court. It was held that the general law allowing two years for appeals or writs of error from the District Court to the Supreme Court applied. Doubtless if the jurisdictional question had not arisen and the writ of error had issued from the

⁹ 203 U. S. 502.

Circuit Court of Appeals, it could have been sued out at any time within six months of the entry of the order.

It would seem that in the vast majority of cases, thirty, or at most sixty, days would be quite sufficient in which to take an appeal from a District Court or a Circuit Court of Appeals. Such limitation, as has been stated, is already imposed upon appeals in some of the most important classes of litigation with which the Federal Courts are called upon to deal.

524. Ways in Which Review by Appellate Tribunal May Be Sought.—There are a number of different ways in which an appellate tribunal may be asked to review the judgments or decrees of a lower. As a rule, in any particular case only one of these is available and which that is depends on the character of the controversy and upon what has been heretofore done in it.

The two ordinary ways of carrying a case up are by appeal and by writ of error. Petitions for *certiorari*, for mandamus and for prohibition and to superintend and revise, in matters of law, proceedings in bankruptcy may also under some circumstances be used to bring before a higher Court a ruling of a lower.

525. Distinctions Between an Appeal and a Writ of Error.—A writ of error was the common law method of securing a review of the alleged mistakes of the trial Court in its conduct of a jury trial. If the issues of fact had been properly submitted to the jury, its findings were not open to further review.

The Seventh Amendment to the Constitution of the United States expressly provides that “no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.”

The limits thereby imposed upon the right of appellate courts to review the facts in common law cases have been fully and learnedly discussed by the Supreme Court.¹

For centuries important rights have been judicially determined by Courts which did not use the jury system. In them a judge or judges passed upon the facts as well as upon the law. As a rule, they had before them, not the living witnesses, but merely the written depositions of such witnesses taken at another time and place. They might easily be mistaken in their conclusions as to what had happened as well as to the applicable law. The members of the appellate tribunal had usually as good an opportunity of getting at the truth. Presumably, those who sat in the higher Courts were abler and wiser than their brethren who presided in those of first instance. There can be little question that, on the average, they in fact are. They usually work under conditions more favorable to quiet and concentrated consideration of the really vital issues involved. There was no reason why they should not be free to consider and determine whether the Court below had not erred on the facts as well as on the law.

Speaking generally, a writ of error brings up for consideration the rulings on questions of law made in the course of a trial at common law. An appeal is used principally in equity and in admiralty. It carries up both facts and law. The original line of distinction still exists to the extent that no appeal can properly be taken in any case at law nor in any case in which the parties are entitled as of right to a trial by jury. In order that the Supreme Court shall not be called upon or permitted to review the decisions of State Courts in matters of fact, an appeal may not be taken, as we have seen, from a decision of the highest Court of the State to the Supreme Court even in an equity case. The only remedy is by writ of error and that brings up the rulings of law and only the rulings of law.

In the State practice in Maryland we no longer have writs of error. One who wants a review by the Court of Appeals, asks for it in precisely the same way if what he complains

¹ Capital Traction Co. vs. Hof, 174 U. S. 1.

of is the erroneous ruling of the Court in the courses of a trial by jury, or the mistaken determination of a question of fact by a Chancellor. He prays an appeal in each case. When he gets into the appellate Court, however, there is the same distinction as to the extent and character of the review there obtainable as exists in the Federal Courts; that is to say, in cases which have been tried by a jury, or by the Court sitting as a jury, the Court of Appeals inquires merely as to the errors of law alleged to have been committed. It does not profess to consider whether there has been an incorrect conclusion upon the facts. If the case taken up is one on the equity side of the Court below, questions of fact as well as of law are open for the consideration of the higher tribunal.

In view of our Maryland experience, and that of many other States, it would seem quite clear that the two methods of invoking the jurisdiction of the appellate tribunal still prevailing in the Federal Courts are not necessary in order to preserve the essential distinction between the two kinds of review, and that the procedure under each of them could be greatly simplified without injuriously affecting any substantial rights.

526. Writ of Error.—A writ of error to bring up the record of a State Court to the Supreme Court of the United States is not a writ of right. It does not issue until it has been allowed either by the chief judge of the State Court, if that Court have more than one judge, or by a justice of the Supreme Court.¹ It is occasionally refused and should be if the judge or justice does not think the case comes within the provisions of the statute. If the application for it is made to a justice of the Supreme Court he may grant or refuse it, or he may refer the question to the Court as a whole.² In the case cited the litigation below had been initiated in the Supreme Court of the District of Columbia. It had been thence carried to the Court of Appeals of the District. The

¹ *Bartemeyer vs. Iowa*, 14 Wall. 26.

² *United States ex rel. Brown, vs. Lane, Sec'y of the Interior*, 232 U. S. 598.

Supreme Court, however, said the same principles applied as in the case of a writ of error to the highest Court of the State. On the other hand, when the writ is to run from one Federal Court to another, it is not, strictly speaking, necessary to have it allowed at all.³ It is the practice to obtain such an allowance which, however, is granted as a matter of course. It may be allowed by a judge either of the Court to which or from which it runs.⁴

527. From What Office the Writ Issues.—The writ is issued by a clerk of Court. Logically, it should come from the clerk's office of the appellate Court to which it is to be returned, and that was the original practice. For convenience, however, another provision has long been made. The clerk of the District Court may issue it, and since January 22, 1912, it may be issued by a clerk of a Circuit Court of Appeals.¹

The Circuit Court of Appeals for the Sixth Circuit has construed the Act last mentioned. It holds that the writ may in all cases issue from the clerk's office of either the Court to, or the Court from, which it runs. That is, when the Supreme Court is asked to review a judgment of a Circuit Court of Appeals the writ may come from the clerk's office of either of those Courts. If a judgment of a District Court is in question, the clerk of either that Court or the Clerk of the Court to which it is to be returned may issue it. The clerk of the District Court may and usually does issue the writ when it is directed to the highest Court of the State. However issued, the writ is always returnable to the clerk's office of the appellate Court.²

528. Assignment of Error.—The law requires that there shall be annexed to and returned with every writ of error various other documents.

First, an authenticated transcript of the record.

³ Davidson vs. Lanier, 4 Wall. 447.

⁴ Supreme Court Rules 36 and 40.

¹ 37 Stat. 54.

² *In re Issuing Writs of Error*, 199 Fed. 115.

Second, an assignment of errors and a prayer for reversal with a citation to the adverse party.

The assignment of errors tells the judge who is asked to allow the writ, what the errors are upon which the petitioner relies, and the opposing counsel and the appellate Court, what questions of law are presented for consideration and determination.¹ While the filing of the assignment is not a jurisdictional requirement,² it is, nevertheless, an important document.*

Supreme Court Rule 35 provides that neither a writ of error nor appeal shall be allowed until such assignment has been filed. It should set out separately and particularly each error asserted and intended to be urged. When the error alleged is to the admission or rejection of evidence, the assignment should quote the full substance of the evidence admitted or rejected. When complaint is made of the charge of the Court, the assignment should set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. The assignment is to be included in the transcript of the record and printed with it. When this is not done, counsel will not be heard except at the request of the Court. Errors not assigned will be disregarded. The Court, however, reserves the option to notice a plain error not assigned. Rule 11 of the Circuit Court of Appeals for this circuit is to the same effect. The 21st rule of the Supreme Court and the 24th of the Circuit Court of Appeals requires the counsel for the plaintiff in error or appellant to set up in his brief distinctly and separately the errors upon which he relies.

The preparation of the assignment of errors requires more skill than is in many cases expended upon it. The assignments should be precise and particular and not vague or general. On the other hand, they should not be too numerous nor should they include errors of a minute character. It is almost always a mistake to have a great number of assignments. It is exceedingly likely to suggest to the appellate

¹ *Simpson vs. First Nat. Bank of Denver*, 129 Fed. 257.

² *Old Nick Williams Co. vs. United States*, 215 U. S. 541.

Court that you have no great confidence in any of them. If you had, you would pick the one or the few upon which you really rely and omit the others.

529. Citation.—In the Federal practice it has always been thought essential that formal notice be given to the other side of the purpose to take the case up. In order to insure that this will be done, you are required to obtain from a judge authorized to allow the writ of error a citation upon your adversaries. The three important papers which are required in connection with a writ of error are therefore:—

1. The writ itself, which is the order from the appellate Court to the lower Court to send up its record.

2. The citation, which is notice to the other side that you have taken the case up.

3. The assignment of errors, which tells both the other side and the appellate Court what it is of which you complain.

Curiously enough, the citation must be signed by the judge, though the writ of error never is, even although it be allowed by him.¹ As it has no purpose other than to notify the other side that the case is being taken up, there is no reason why the signature of the clerk would not do quite as well. Courts recognizing this fact, have held that any irregularity as to the signature of the citation or its service may be readily waived. For example, in the case last cited, the citation was signed by the clerk and not by the judge. It was, therefore, irregular. The defendant in error, however, entered his appearance in the Supreme Court. He took no other action at that term. When at the next he called attention to the absence of the judge's signature, it was held that he had waived his right to take advantage of that circumstance.

It should be regularly served as other writs, except that service upon the attorney or counsel of record of the defend-

¹ Chaffee vs. Hayward, 20 How. 208.

ant in error will do. Merely mailing it to a defendant in error is not sufficient.³

530. Appeals.—Where an appeal is the proper method of taking the case up, the defeated party is entitled to appeal. It is true that it is necessary for him to have his appeal allowed. Nevertheless, it is, in a proper case, a matter of right. The Supreme Court has said that its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking the jurisdiction of the reviewing tribunal.¹

An appellant presents a short petition to the lower Court or the judge thereof stating his desire to appeal and asking that his appeal be allowed. With this he presents his assignment of errors and a citation to the other party, as he does when he sues out a writ of error. It is not necessary to obtain a citation when both the appeal is prayed and the bond given in open Court during the term at which the judgment or decree appealed from is entered. The presumption is that all the parties are present in Court.²

531. Appeal Bond. Neither an appeal nor writ of error is complete until a proper bond is given with good and sufficient security that the appellant or plaintiff in error will prosecute his appeal or writ with effect, or if he fails therein will answer for all costs. Regularly this bond should be presented and approved at the time the appeal or writ is allowed and the citation issued, but the failure to do so at that time is not fatal to the jurisdiction. It may be presented and approved in the appellate Court.¹

532. Summons and Severance.—In cases at law where a judgment is joint, all the parties against whom it is rendered must unite in the writ of error. In chancery cases all those against whom a joint decree is rendered must partici-

³ Tripp vs. Santa Rosa Street R. R. Co., 144 U. S. 126.

¹ Brown vs. McConnell, 124 U. S. 489.

² Hewitt vs. Filbert, 116 U. S. 142.

¹ Brown vs. McConnell, 124 U. S. 489.

pate in the appeal. If one or more do not, the writ or the appeal, as the case may be, will be dismissed. The purpose of the rule is to insure that the successful party shall not be prevented by the appellate proceeding from enforcing his judgment or decree against the parties who do not wish to have it reviewed, and to avoid the possibility of the appellate tribunal itself being required to decide a second or third time the same question on the same record. This it might have to do, if different parties could prosecute separate appeals.

The common law had worked out a method of proceeding when one would not take legal steps to secure a right which others jointly interested with him wished to enforce. It might be that two persons were the holders of a joint obligation; neither could legally sue without the other. Or, it might be, that a judgment had gone jointly against two persons and only one of them was willing to sue out a writ of error. In either case the party who wished to proceed caused a writ of summons to be issued. The unwilling one was thereby brought before the Court. If he then still refused to act, an order or judgment of severance was made against him. Thereafter his right to sue upon the claim was gone forever, and the other party might proceed without him. This somewhat elaborate mode of procedure has probably become obsolete. Strict compliance with it is no longer necessary. All that is required is that written notice of the desire of the other to appeal be served on him or that he enter his appearance in Court and there refuse to proceed. When either of these facts are shown, the Court may allow the other party to prosecute his appeal alone.

In one case an appeal had been taken in the name of two persons. One of them appeared and had the order of appeal, so far as he was concerned, stricken out. It was held that all the purposes of a summons and severance had been obtained. The other party could proceed without him.¹

The appellee can at once enforce his decree against the party who will not join and the latter will be estopped to appeal thereafter.²

¹ Farmers' Loan & Trust Co. vs. McClure, 78 Fed. 211.

² Masterson vs. Herndon, 10 Wall. 416.

533. Supersedeas.—If the plaintiff recovers a judgment below in a suit at law, or if a decree in equity requires one of the parties to pay money, to convey property, or to do or refrain from doing some other thing, it may be quite important to the person against whom the judgment or decree has gone that he shall have the right, pending the determination of the appellate proceedings, to have the enforcement of the decree below suspended or, in legal phrase, superseded. In order that he may have an opportunity to do this, the Revised Statutes¹ provide that where a writ of error may operate as a supersedeas, execution shall not issue until after the expiration of ten days from the entry of the judgment. It will behoove a defendant, therefore, against whom judgment has been given, to sue out his writ of error and to do the other things necessary to supersede the judgment within ten days. It is true that the same section gives him sixty days, exclusive of Sundays, in which he may as of course supersede, but the plaintiff may at any time after the ten days cause execution to issue. The subsequent giving and approval of the bond will stop further proceedings. It will not undo anything which has been done. A judgment ousting the defendant from office and putting the plaintiff in had been given by a territorial Court. Ten days, exclusive of Sundays, after the entry of the judgment passed without the giving of any supersedeas bond. At the end of that period execution issued. Defendant was put out and plaintiff in. Thereafter, and within sixty days from the entry of the original judgment a supersedeas bond was filed and approved. The plaintiff below refused to vacate the office into which the judgment of the territorial Court had put him. The defendant below, the plaintiff in error above, thereupon applied to the Supreme Court for an order restoring him to the office, but that Court held that the supersedeas did not undo anything which before it was granted had been lawfully done. The appeal was thereupon dismissed by consent. The term of the office in dispute would have expired before the case could in its regular order have

¹ Sec. 1007.

been heard by the Supreme Court. In such cases the importance of giving bond promptly is obvious.²

A judge or justice of the appellate tribunal may at his discretion allow a supersedeas even after sixty days, but only in the event that the writ of error has been issued within that time; that is to say, if the party aggrieved wishes to prevent his adversary from executing, he must sue out his writ of error and have his supersedeas bond allowed within ten days. If he wishes to be in a position to ask for a supersedeas at all he must obtain his writ of error within sixty days. If he does, he has the right within sixty days to supersede the judgment or decree. If he allows the sixty to elapse, he may even then be allowed to supersede if, in the discretion of a judge of the appellate Court, it is proper that he should, but if he has not sued out his writ of error within the sixty days he cannot in any way obtain a supersedeas.³

The exclusion of Sundays applies to all the periods mentioned in the section of the Revised Statutes under consideration. Sundays are not counted at all, so that the plaintiff in error or appellant has sixty secular days after the judgment or decree in which to obtain his writ of error and file his supersedeas bond.⁴

534. Amount of Supersedeas Bond.—An appeal bond is required in all cases. If, however, the appellant or plaintiff in error does not wish to supersede or is unable to give security in the amount required, his bond may be limited to a sum sufficient to cover the probable costs of an appeal. On the other hand, if he does wish his appeal to operate as a supersedeas, he must give bond sufficient, if he fail in his appeal to insure the payment of all damages and costs. The amount of the bond, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just

² Board of Commissioners vs. Gorman, 19 Wall. 661.

³ Kitchen vs. Randolph, 93 U. S. 86.

⁴ Danville vs. Brown, 128 U. S. 503.

damages for delay and costs and interest on the appeal. Where the property in controversy necessarily follows the event of the suit, as in real actions, in replevin and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in the case of recapture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the Court, the bond will be required in an amount sufficient merely to secure the sum recovered, for the use and detention of the property and the costs of the suit and just damages for delay, and costs and interest on the appeal.¹

535. What Decrees Can Not Be Superseded as of Right.—There are many decrees in equity which the appellant has no absolute right to supersede. They may be important. They may grant an injunction or they may refuse or dissolve one, or they may appoint a receiver. Still the party aggrieved, though he appeal, cannot demand that the enforcement of the decree shall be superseded.¹ In such matters the statute give the trial or the appellate Court or a judge thereof the discretion to say whether in any particular case the order shall or shall not be superseded. Where appeals are taken from interlocutory decrees granting or refusing or dissolving injunctions or appointing receivers under section 129 of the Judicial Code the order appealed from is not suspended during the pendency of the appeal unless the Court which passed it or the appellate Court or a judge thereof shall otherwise order. The contention that language of the section implies a suspension of the order appealed from was held by the Supreme Court to be unjustified.²

By the 74th Rule, when a judge or justice who took part in the decision of the cause, allows an appeal from a final decree in an equity suit granting or dissolving an injunction he may in his discretion at the time of such allowance make

¹ Supreme Court Rule 29.

² *Hovey vs. McDonald*, 109 U. S. 150.

² *In re Haberman Mfg. Co.*, 147 U. S. 525.

an order suspending, modifying or restoring the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

536. Certiorari.—A writ of *certiorari* was one of the writs habitually issued by the Court of King's Bench. It is not mentioned among those which the appellate Courts of the United States are authorized to issue, except in the Act of 1891, establishing the Circuit Courts of Appeals. Nevertheless, for some purpose, it is used by the Supreme Court and also by the Circuit Courts of Appeals. In their practice, it is an auxiliary process only, intended to supply imperfections in the record of the case already before the Court which issued it. It is not used as a writ of error to review a judgment of an inferior Court.¹ It will never be granted where there is a plain and adequate remedy by appeal or writ of error.² It goes without saying, that it can never in any case be issued by a Court which has no right to review the action of the lower Court in the matter complained of.

537. Certiorari Granted When Necessary to Protect Appellate Jurisdiction.—There may be peculiar and exceptional circumstances which imperatively demand that the appellate Court shall issue the writ and by so doing put itself in a position to dispose promptly of the entire matter in controversy. It may be impossible otherwise effectively to protect its own jurisdiction.¹ In the case cited *Chetwood* had been carrying on some litigation in the State Courts of California against the officers of a national bank, which at the time was in receivers' hands. Subsequently, and while his litigation was still pending, the receiver having paid all the debts of the bank, its stockholders, in accordance with the provisions of a statute giving them the authority so to do, voted that the receiver should turn over the balance of its assets to an agent. *Chetwood* had been using its name in his

¹ *American Construction Co. vs. Jacksonville R'way*, 148 U. S. 372.

² *Whitney vs. Dick*, 202 U. S. 132.

¹ 165 U. S. 443.

¹ *In re Chetwood*, 165 U. S. 443.

litigation and about \$27,000 had been paid into the State Court by some of the defendants in the cases he had instituted. At the instance of the agent of the bank, the United States Circuit Court for the District of California enjoined Chetwood from further using the bank's name in any litigation and required him to turn over the \$27,000 to its agent. The highest Court of the State subsequently decided against Chetwood. He, in the name of the bank, sued out a writ of error to the United States Supreme Court. For so doing he was attached and punished for contempt of the injunction of the Circuit Court. On petition for writ of *certiorari* the Supreme Court held that the question of whether he had a right to use the name of the bank in suing out a writ of error and all like questions were exclusively within its control; that he could not lawfully be enjoined from taking such action as he thought proper to bring his case before it, and that, therefore, it would grant the writ of *certiorari* to bring up the record if its actual grant should be necessary. It presumed, however, that the intimation of its opinion would be sufficient, and so it doubtless proved.

538. May Circuit Courts of Appeals Issue Writ of Certiorari.—The question whether such a writ may be issued by a Circuit Court of Appeals under similar circumstances has never been expressly decided. The reasoning of Supreme Court in a case in which the matter was discussed would seem to indicate that a Circuit Court of Appeals may grant it under circumstances which would, independently of the Act of 1891, justify its issue by the Supreme Court.¹

539. Certiorari Will Not Be Issued to Review Administrative Actions.—Neither the Supreme Court nor a Circuit Court of Appeals will grant the writ of *certiorari* to review the administrative decisions of public officers and boards not acting in a judicial capacity.¹

¹ Whitney vs. Dick, 202 U. S. 132.

¹ Degge vs. Hitchcock, 229 U. S. 162.

In the case cited, the Supreme Court of the District of Columbia was asked to issue a writ of *certiorari* to review the action of the Postmaster General in forbidding the petitioners the use of the mails in furtherance of a scheme which he held to be fraudulent.

540. Certiorari From Supreme Court to the Circuit Courts of Appeals.—The Act of 1891, by a provision which in substance now forms the first sentence of section 251 of the Judicial Code, authorized the Supreme Court in any case in which the judgment or decree of a Circuit Court of Appeals was made final, to require by *certiorari* or otherwise any such case to be certified to it for its review and determination, with the same power and authority as if it had been carried by writ of error or appeal to the Supreme Court.

The Supreme Court is very often asked to exercise this right. It grants the request perhaps one time in six.

541. Supreme Court Will Grant Certiorari When Circuit Court of Appeals Has Been Improperly Constituted.—One of the classes of cases in which it will grant it is when the Court below was improperly constituted. The law provides that no judge before whom the cause or question may have been tried or heard in the District Court shall sit in the trial or hearing of such question in the Circuit Court of appeals.

A district judge felt himself unable from pressure of business to give an important patent case the consideration it deserved. He entered a *pro forma* decree in favor of the defendants and at the same time set forth in writing that he had given the question no consideration whatever, and that the decree was signed merely for the purpose of expediting an appeal. The case was heard in the Circuit Court of Appeals before two circuit judges and the district judge who had signed the decree. Both parties consented to his serving. The Supreme Court held that no consent could qualify him to sit; that the error was so grave that it would allow the writ of *certiorari*. Then it pointed out that if it

simply placed the case on its docket for hearing in due course it would do precisely what it would have done had the Circuit Court of Appeals been properly constituted and the writ of *certiorari* allowed for other reasons, or, to put it in another way, that it would hear the case in the first instance without any previous hearing having been had before a properly constituted Circuit Court of Appeals. The judgment of the Circuit Court of Appeals was thereupon at once reversed and the cause remanded to be heard again.¹

542. When Writ Dismissed.—The Supreme Court may grant the writ on the assumption that the case involves an issue of importance sufficient to justify it in so doing, and at the hearing it may find that a mistake had been made and that no such question is raised at all. When that happens the writ will be dismissed.¹

543. Certiorari is Extraordinary Writ. Circumstances Under Which it Will Issue Are Not All Definable.—The Supreme Court has said that the writ is an extraordinary one and that no attempt to define all the circumstances under which it will be granted will be made. It will usually be issued where Circuit Courts of Appeals of different Circuits have reached different conclusions, or where the question involved is one of great importance and difficulty, and upon which there should be an early and authoritative decision by the Court of last resort. Sometimes, but not frequently, it has been granted when there has been a marked difference of opinion between the judges below and the question is of general concern. The Supreme Court is so sharply pressed for time that it is granted very sparingly.

544. Certiorari Not Granted Unless Decision of Circuit Court of Appeals is Final.—It will not be granted in any case in which the decision of the Circuit Court of

¹ Cramp vs. International Curtiss Marine Turbine Co., 228 U. S. 645.

¹ United States vs. Rimer, 220 U. S. 547.

Appeals is not made final. When an appeal or writ of error lies from such decision *certiorari* will not be issued. The two remedies are not cumulative.¹

545. How Certiorari Is Applied For.—The application for the writ is made to the Supreme Court itself. The petition sets forth the ground upon which its issue is asked. It must be accompanied by a certified copy of the entire transcript of record in the case, including the proceedings in the Court to which the writ of *certiorari* is asked to be directed. The petition should contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. The Supreme Court adds the significant reminder that a failure to comply with this direction to make the statement and summary short will be taken as sufficient reason for denying it. Thirty copies of the petition and transcript and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of it and the brief, if any, in its support, shall be served on the counsel for the other side at least two weeks before such date if such counsel resides east of the Rocky Mountains, three weeks if he lives west of them. If the respondent wishes to file a brief he must do so at least three days before the date fixed for the submission of the petition. The Supreme Court will not hear oral arguments on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the Court for the term.¹

546. Mandamus.—In cases which are within its appellate jurisdiction the Supreme Court may issue writs of mandamus to inferior Courts. For example, if a judge of a Court, in a case in which a writ of error may issue directly from the Supreme Court, refuses to sign a proper bill of exceptions tendered to him, the Supreme Court will grant a mandamus to compel him to do so.¹ The dissenting opinion

¹ United States vs. Beatty, 232 U. S. 463.

¹ Supreme Court Rule 37, par. 3.

¹ *Ex parte Crane*, 5 Peters, 188.

by JUSTICE BALDWIN, in the Crane case, is a very learned and interesting review of the old law as to the issue of the writ of mandamus by superior to inferior Courts.

The power to issue this writ in aid of its jurisdiction is also possessed by the Circuit Courts of Appeals.²

If a judge of a lower Court refuses to take jurisdiction in a case in which his jurisdiction is clear, a mandamus may issue to require him to do so.³

It should be borne in mind, however, that if the case has proceeded to such an extent that a writ of error could be sued out, the writ of mandamus will not issue. It is granted, as a rule, only when there is no other adequate remedy.⁴

The writ will not issue to control the discretion of a lower Court. It will issue to compel the Court to exercise a discretion when it has refused to do so.⁵

547. Petition to Revise in Matter of Law.—Where a question arises in a proceeding in bankruptcy, as distinguished from a controversy in bankruptcy proceedings, section 24b of the Bankrupt Act permits the filing of a petition to revise in matter of law. This petition may be used to review interlocutory orders and frequently is. It takes up questions of law only—not of fact. The petition is filed either with the clerk of the proper Circuit Court of Appeals or with the clerk of the Court appealed from. It should recite the proceedings in the Court below, should point out every question of law involved, and state the ruling of the District Court thereon. A certified copy of so much of the record as shows what the issue of law was and how it arose must accompany the petition. In this circuit there is no rule of the Circuit Court of Appeals fixing the time within which such petition must be filed. It may, therefore, be filed at any time within six months.¹ In some circuits, the rules require

² McClellan vs. Carland, 217 U. S. 268.

³ *In re Hohorst*, 150 U. S. 653.

⁴ *In re Pennsylvania Co.*, 137 U. S. 451.

⁵ *Ex parte Morgan*, 114 U. S. 174.

¹ *Kenova Loan & Trust Co. vs. Graham*, 135 Fed. 717.

it to be filed within ten or fifteen days. Due notice of it must be given to the other party.

548. Prohibition.—Sometimes the most effectual way in which a superior Court may exercise its appellate jurisdiction is by a writ of prohibition directed to an inferior Court forbidding it to assume a jurisdiction to which it is not entitled.

Section 234 of the Judicial Code empowers the Supreme Court to issue writs of prohibition to the District Courts when sitting as Courts of admiralty and maritime jurisdiction. It is probable that this provision, which has come down from the original Judiciary Act, is a survival of the old practice of the Court of King's Bench, which was much in the habit of issuing prohibitions to the Courts of Admiralty to keep them within the narrow limits of admiralty jurisdiction fixed by the English Courts of common law. This grant of power permits the Supreme Court in admiralty matters to issue the writ of prohibition to a District Court even in cases in which a direct appeal from the latter to the former would not lie. With this exception the Supreme Court cannot, in any case in which it has neither original nor appellate jurisdiction, grant prohibition, mandamus or *certorari*. Where the writ of prohibition is necessary to protect or further the appellate jurisdiction of the Supreme Court in a case in which that jurisdiction exists, the writ may issue; otherwise not. The same rule governs its issue by the Circuit Courts of Appeals.

549. Certification of Questions to the Supreme Court.—By section 239 of the Judicial Code the Circuit Court of Appeals is authorized at any time to certify to the Supreme Court of the United States any questions or propositions of law for the proper decisions of which it desires the instructions of that Court. When the questions are certified up, the Supreme Court may do either one of two things. It may give the instructions. If it does they are binding upon the Circuit Court of Appeals, or it may require that the whole record and cause be sent up for its considera-

tion. If it takes the latter course it is required to decide the whole matter in controversy in the same matter as if the case had been brought to it by a writ of error or appeal.

In this class of cases the Supreme Court is quite insistent that the Court below shall not evade its responsibility of decision. Not infrequently the questions certified by the Court below have been so framed that they practically ask the Supreme Court how to decide the cause, which may be a more or less complicated one of mixed fact and law. Under such circumstances the Supreme Court invariably refuses to answer at all.

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